IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. ~~800~~ 5

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY, STUART SOLOMON BROWN,
Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

Opinion Below.

The opinion of the Circuit Court of Appeals (majority 1 R. 180; dissenting 1 R. 221; on petition for rehearing 1 R. 231) is reported in 123 F. 2d at page 111.

The trial court filed no opinion.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered September 15, 1941 (1 R. 222). A petition for rehearing was denied on November 6, 1941 (1 R. 231). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal Cases promulgated by this court.

QUESTIONS PRESENTED.

1. Whether the District Court erred in refusing to quash the indictment.

2. Whether the substantive counts of the indictment are fatally defective in, first, charging against respondents several distinct offenses in each count and, second, in failing to bring the charges under the only applicable Internal Revenue law.

3. Whether there was any substantial evidence to support either the substantive counts or the conspiracy count in the indictment.

4. Whether the Court of Appeals weighed the evidence or decided the credibility of witnesses.

5. Whether the verdict against respondents was based upon improper extra-judicial statements and innuendoes of the prosecutors which were placed before the trial jury.

6. Whether the testimony of witness Clifford invaded the province of the jury.

STATEMENT OF THE CASE

On March 29, 1940, during the March term of Court, an indictment was returned by the December 1939 grand jury (1 R. 2-25). The first four counts charged Johnson (respondent in Case No. 799) with wilful attempts to evade income taxes for the years 1936 to 1939 inclusive by filing false income tax returns on March 15th of each following year; each of these counts also charged that the respondents, Sommers, *et al.*, did, from the beginning of the calendar year involved in each count up to the time of the return of the indictment, aid, abet, conceal, induce and procure Johnson to attempt to evade said taxes. The fifth count (1 R. 17) charged a conspiracy throughout the same period of years to defraud the United States of the taxes upon Johnson's income for the years in question.

Johnson was a person of very substantial means. He owned, either alone or jointly with others than these respondents, several buildings in Chicago.

These respondents (except Brown who operated a currency exchange) operated gambling houses on premises rented in some instances from Johnson, and in other instances from third parties (3 R. 411, 462, 464).

Johnson reported very large income and paid large taxes thereon for the years in question. These respondents also reported substantial incomes and paid taxes thereon.

At the trial the government introduced evidence against Johnson on two distinct theories:

(1) By offering proof tending to show that he expended in the years involved more money than he reported as income in his income tax returns.

This expenditure evidence in no way implicated these respondents.

(2) By undertaking to prove that he was the *sole* owner of the gambling houses operated by these respondents, as the basis for a presumption that *all* the checks cashed and currency exchanged by the operators of these houses was income, not to them, but to Johnson; which said aggregate of assumed income was larger than the amounts reported by Johnson in his returns.

The proof under the second or gambling house ownership theory was entirely circumstantial. The Circuit Court of Appeals held, after careful examination of this evidence and giving it the view most favorable to the government, that at most it indicated that Johnson had *some* interest in the gambling houses, but that the extent of such interest was not disclosed by the evidence. The Court of Appeals said (1 R. 195):

> "The evidence does not show that he (Johnson) was the sole owner and therefore entitled to all the proceeds. * * * As already stated, Johnson reported a large income for each of the years in question, and to say that his interest in the gambling houses was such as to entitle him to an income greater than that reported is to indulge in rank speculation. If Johnson had reported no income for those years, a different situation would have been presented."

Speaking of these respondents, the lower court said (1 R. 196):

> "These returns (of Sommers, *et al.*) disclose a substantial income on the part of the co-defendants who, according to the government's theory, were mere employees of Johnson in the operation of the various gambling houses. The amount of income reported indicates that such co-defendants had an interest in such houses rather than that they were mere employees of Johnson as contended."

Neither the petition for certiorari nor the dissenting opinion in the Court of Appeals directly takes issue with or attempts to controvert the soundness of the reasoning of the majority opinion last above set forth.

The second reason for holding the evidence under the substantive counts insufficient against these respondents, consisted of the absence of any evidence that these respondents had any connection with the preparation or filing of Johnson's tax returns on March 15th, and the further absence of any evidence of knowledge or information on their part of the contents of Johnson's returns.

The Court of Appeals held that there was sufficient evidence to go to the jury in support of the conspiracy count. Respondents take issue with this ruling.

Aside from the lack of evidence on essential issues to make a case against these respondents, numerous errors in failure to observe the fundamental rules of criminal procedure intervened both before and during trial.

The first of these errors in point of time occurred in the petition of the grand jury and the order based thereon of February 28, 1940 (1 R. 29), for the purpose of continuing the existence of the grand jury into the third or March term of its existence. A plea in abatement of these respondents (1 R. 32) pointed out that the order violated the terms of the statute (U. S. Supp. V. Title 28, sec. 421; Judicial Code sec. 284), in that it purported to authorize the grand jury to continue not only those investigations begun in the December or original term, but also those begun in the February term. The plea also demonstrated that the fourth count was invalid as beyond the authority of the particular grand jury in that it charged an offense committed on March 15, 1940, which could not possibly have been the subject of investigation in the December, 1939 term, which expired more than a month before the offense could have been committed.

These respondents moved for a rule on the government to answer the plea in abatement (1 R. 44). This was denied and a motion of the prosecution to strike the plea was granted by the trial court (1 R. 46). The Court of

Appeals held that the striking of the plea was erroneous and that the plea should have been sustained.

Proceeding next to the charges against these respondents in the indictment, the Court of Appeals held that inasmuch as the first four counts charged Johnson with criminal attempts to evade taxes committed on March 15 of each year, while charging these respondents with aiding and abetting such attempts throughout a long period of time both before and after March 15, viz., from January 1st of the tax year to the time of the return of the indictment, there was a fatal inconsistency between the charges against Johnson and those against these respondents, which inconsistency invalidated the latter (1 R. 190-191).

In addition, the Court of Appeals held that the substantive counts were bad, because they charged these respondents as accessories both before and after the fact (1 R. 191-192).

Finally the Court of Appeals held that there was reversible error in allowing witness Clifford, an accountant employed by the government, to testify as to the amount of Johnson's income for each year from a consideration of all the evidence in the case (3 R. 742-743).

Inasmuch as this case and the Johnson Case No. 799, are here upon one record, and an accurate and necessarily lengthy statement of facts is made in the brief on behalf of Johnson, we respectfully ask leave to adopt said statement, in the interests of avoiding repetition and request that the court consider it as if repeated herein.

SUMMARY OF ARGUMENT.

I.

The District Court erred in refusing to quash the indictment. The government has filed but one brief in this case and that of *United States* v. *Johnson*, No. 799. Therefore counsel for these respondents respectfully ask leave to refer to argument on behalf of respondent Johnson, case No. 799, and request that the court consider it as if repeated herein.

II.

A. *Each of the first four counts of the indictment is fatally duplicitous in charging against respondents two distinct offenses, namely, aiding and abetting Johnson in the alleged attempt to evade his taxes and also concealing Johnson and or his crime after its alleged commission.* These counts allege substantive offenses against Johnson of attempts to evade taxes for four different years. The counts also charge aiding, abetting and concealing against these respondents for a long period of time before and after the principal's offense. The counts therefore charge the offenses of being accessory both before and after the fact, apparently under Sections 550 and 551 of Title 18 U. S. C. The statutes define substantially different offenses, provable by different evidence and punishable by different punishments. Such joinder of offenses is fatal duplicity. Sections 550 and 551 are derived from the common law. The counts charged legal and actual impossibilities against the aiders. Prejudice to respondents in this erroneous joinder is serious as neither court, counsel nor the jury are informed as to which offense is intended nor what punishment should be inflicted upon a verdict of guilty.

The excuse of surplusage is without basis. A substitution of the word *counsel* for *conceal*, as suggested, and the disregarding of extensive allegations of time would in effect improperly amend the indictment. The claim of surplusage is baseless because the charge and proof of concealment was made an important part of the government case by the allegation of overt acts in the indictment, the specification of matters in the bill of particulars, and by much of the evidence at the trial.

The law is that when a verdict is based upon several charges, one of which is invalid and it is uncertain on which charge the verdict was founded, the judgment cannot stand. In addition, the instructions of the trial court laid stress upon negligence, carelessness, and shutting one's eyes to obvious facts as indicating guilt of the aiders. If pertinent at all, such matters would relate to accessories after and not before the fact.

B. *The first four counts failed to charge violation of the proper Internal Revenue law by the alleged aiders.* Section 3793 (C)(b)(1) of Title 26 provides for the punishment of persons aiding or assisting in the preparation or presentation of any false or fraudulent return under the Internal Revenue laws. This is the same charge which the Government claims is set forth here by the combination of the use of Section 550, Title 18 U. S. C. and Section 145(b) of the Internal Revenue law. Section 3793, being of later date and more specific application, supersedes the earlier and more general statute. It has been so used in the Second Circuit. The Senate Report at the time of its passage said it was designed to discourage specifically the presentation of false returns to the Department. Had this statute been followed by the Government, the fatal duplicity in the indictment and many improper prejudicial averments would probably have been avoided.

III.

A. *There was no evidence of intent or act of respondents to aid Johnson's alleged attempt to evade taxes.* Proof of direct connection of respondents with the principal's offense is necessary. The authorities so decide. The claim that any act, however insignificant, is sufficient as against the alleged aiders is unsound. The authorities so decide. The participation must be substantial and directly connected with the principal's offense, not with antecedent and coincidental actions. The authorities so decide.

There is no proof of willfulness or specific intent to evade Johnson's taxes as against the alleged aiders. The authorities decide that this is necessary.

B. *Lack of evidence to show conspiracy as against these respondents.* No evidence of the conspiracy charge was adduced nor is any mentioned in the government brief. These respondents were entirely ignorant of Johnson's income tax affairs and had no knowledge of nor connection with his returns or the payment or non-payment of his income taxes. The Court of Appeals held that, at best, the evidence indicated merely an interest of Johnson in the gambling houses and that the amount of the interest being uncertain the income presumptively received therefrom was uncertain. Such assumed interest must have been small, as indicated by the trivial nature of the transactions relied on to establish such interest. Moreover, the presumption that Johnson's expenditures in 1936, 1937, 1938 and 1939 were made from current income received in those years is based upon alleged admissions of Johnson and his income tax returns in the years previous to 1936. These alleged admissions and income tax returns are hearsay as to these respondents. The government wishes the court to assume that Johnson's returns up to 1936 were ac-

curate but were inaccurate for every year thereafter. Moreover, if it were presumed that Johnson received any money from respondents' gambling houses, it would also be presumed that this money was included in the large sums reported by him in his returns and that if he received any monies in addition to that shown by his return they were received from sources other than these respondents.

IV.

The Court of Appeals did not weigh the evidence nor decide the credibility of witnesses. The government cites no statement in the Court of Appeals opinion supporting its contention here. The Court of Appeals properly found an entire absence of evidence as to the extent of Johnson's alleged interest in the gambling houses and consequent failure of the presumption that he received all the income therefrom. The cases cited by the government here are not applicable. The evidence leaves it a matter of speculation as to the amount of income if any Johnson allegedly received from the gambling houses.

V.

The verdict against respondents was apparently based upon improper extra-judicial statements and innuendoes of the prosecutors placed before the trial jury. The so-called statements taken by government agents and attorneys from respondents Sommers, Kelly, Hartigan and Brown contained denials by them of charges and insinuations of wrong doing made by their inquisitors. Such denials are inadmissible in evidence under the authorities. In addition, the substance of these statements made suggestions of the interest of Johnson in the gambling houses and suggestions of guilt of respondents not only of gambling but of connection with Johnson's income tax affairs.

Stress was thereby laid on the theory of the prosecution here and also upon the fact that respondents were gamblers and many details of the gambling business. Introduction of part of the transcript of the examination of Brown before the grand jury was gravely prejudicial to all respondents. In this examination three prosecuting attorneys subjected Brown to a scathing and threatening cross-examination combined with critical comments affecting all respondents and intimations of misconduct by them. It was entirely improper to present such matters to the trial jury. This is apparent from a brief description of the nature of such examination. By this, in effect the prosecuting attorneys presented their charges and criticisms against respondents before the trial jury in such a manner as to deprive respondents of their constitutional rights.

VI.

The error in introduction of Clifford's testimony was fatal. We respectfully ask leave to adopt the argument on behalf of respondent Johnson in case No. 799 on this point and request that the court consider such argument as if repeated herein.

ARGUMENT.

I.

The Court of Appeals rightly decided that the District Court erred in refusing to quash the indictment.

The government has filed but one brief in this case and that of *United States* v. *Johnson*, No. 799. Inasmuch as the argument on behalf of respondent Johnson, in case No. 799 and that on behalf of these respondents is substantially similar with respect to this point, in the interests of brevity, we respectfully ask leave to adopt the argument in the brief of Johnson on the propositions involved and request that the court consider it as if repeated herein.

II.

(A) Each of the first four counts of the indictment is fatally duplicitous in charging against respondents two distinct offenses, viz., aiding and abetting Johnson in the alleged attempt to evade his taxes and also concealing Johnson and or his crime after its alleged commission.

(B) Each of these counts is fatally defective in failing to bring the charges within the only applicable internal revenue law.

(A) *Duplicity in the first four counts.*

The first four counts each allege substantive offenses against Johnson of attempts to evade taxes for different years. These counts are identical except that each specifies a different year, and, of course, the amounts of Johnson's

alleged income, and tax due, vary from year to year. As to these respondents the first count charges:

"That heretofore, to-wit, during the calendar year 1936 and up to and including March 15, 1937, and continuously thereafter, up to and including the date of the filing of this indictment, * * * defendants, well knowing all the premises aforesaid, did unlawfully, feloniously, willfully, and knowingly, aid, abet, conceal, induce and procure" Johnson to attempt to evade and defeat his income tax for the year 1936.

Each of these counts charges two distinct and different offenses: first, aiding and abetting the commission of the principal's crime (known at common law as being accessories before the fact); and second, concealing the crime or the criminal (known at common law as being accessories after the fact). The two classes of accessories are dealt with in Sections 550 and 551 of Title 18 of the United States Code, which are set forth in the appendix hereto. Inspection of these Sections instantly discloses the fundamental difference between them. These differences are substantially those which pertained to the respective offenses under the common law.

It is clearly evident that the pleader here has set forth in each count charges under both Sections.

Thus, under Section 550, that these respondents "during the calendar year 1936 and up to and including March 15, 1937, did aid, abet, * * * induce, and procure" Johnson to attempt to evade his income taxes.

Under Section 551, that these respondents "continuously thereafter up to and including the date of the filing of this indictment, did * * conceal * * *" the said Johnson, etc.

It is clear that the allegation of time from March 15, 1937, to the time of the return of the indictment, March 29, 1940, pertains to the concealment of Johnson, and/or his alleged crime after his alleged offense committed on March

15, 1937, because the only concealing of Johnson that would be a crime under the law, would be concealment after he had committed an offense and not before such commission. The only aiding and abetting (if the term be proper) legally possible after March 15, would be in the nature of concealment of the crime and/or the criminal. Although Johnson is charged with concealing income, records, etc., in each of the first counts, this is not the offense of attempting to evade taxes by filing false returns —the only offense which the government claims is charged against Johnson. *United States* v. *Rachmil*, 270 Fed. 869, 871; approved *United States* v. *Novack*, 273 U. S. 202, 206, 70 L. Ed. 610, 612.

It cannot be doubted that the joinder of charges under Sections 550 and 551, *supra*, in a single count of the indictment is fundamentally improper. This is so because the offenses set forth in the two sections are entirely different and distinct, are provable by different evidence and are punishable by different punishments. *Creel* v. *United States*, 21 F. (2d) 690, 691; *Allison* v. *United States*, 216 Fed. 329; *Ammerman* v. *United States*, 216 Fed. 326; *Lehman* v. *United States*, 127 Fed. 41.

In the case of *Creel* v. *United States*, 21 F. (2d) 690, 691, the Court had under consideration a conviction upon counts each of which charged that the defendant did unlawfully sell and furnish intoxicating liquor. The Court, after quoting the provisions of the statute respecting selling and furnishing liquor, continued:

> "• • • It is apparent from these provisions that the punishment for the offense of selling is different from the punishment for the offense of furnishing. It is also clear that Congress, by providing different punishments for selling and for furnishing, emphasized the distinctness of the two offenses.
>
> "The case at bar does not fall within that class of cases in which a statute prohibits the doing of a thing in any one of several modes, and in which conse-

quently each of the modes may be alleged in the same count without duplicity resulting. Examples of such cases are *Crain* v. *United States*, 162 U. S. 625, 16 S. Ct. 952, 40 L. Ed. 1097; *Egan* v. *United States*, 52 App. D. C. 384, 287 F. 958; *Wright* v. *United States*, *supra*.

"In the instant case the allegations do not set forth different modes of committing the same offense, but they set forth the commission of two different offenses. It is, of course, possible to furnish without selling, and it is also possible, though not so frequent, to sell without furnishing.

"(3) It is suggested that the word 'furnish' may be disregarded as surplusage. We do not think this can be done. Words adequately charging a distinct offense cannot be rejected as surplusage. If they could, the vice of duplicity in criminal pleading could be practiced with impunity. The language of the information adequately charges two distinct offenses. If the words 'and furnish' are stricken out, there remains an adequate charge of sale. If the words 'sell and' are stricken out, there remains an adequate charge of furnishing. The rule is stated in 31 C. J. 774, 334, as follows: '• • • Where separate offenses are sufficiently charged, none of them can be rejected as surplusage in order to support the charge as of another.' See *United States* v. *Patty* (D. C.), 2 F. 664. And, even if an amendment to the information were possible before the trial, no amendment was made or prayed for.

"(4) Furthermore, there can be no other verdict where the offenses are subject to different punishment. 31 C. J. 879, 551; *Ammerman* v. *United States*, 216 F. 326 (C. C. A. 8); *John Gund Brewing Co.* v. *United States*, *supra*; *People* v. *Wright*, 9 Wend (N. Y.) 193; *Reed* v. *People*, 1 Parker Cr. R. (N. Y.) 481.

"(5) Nor can we assent to the contention that the duplicity was a mere technical defect, to be disregarded under Section 1025, Revised Statutes (U. S. C. Tit. 18, 556 (18 U. S. C. A. 556)), and Section 269, Judicial Code, as amended (U. S. C. Tit. 28, 391 (28 U. S. C. A. 391; Comp. St. 1246)). The defect was

one of substance, and not within the purview of either of those statutes.

"We are constrained to hold, therefore, that there was a joinder of distinct offenses in each of the counts of the information, and that the demurrer should have been sustained on that ground. *John Gund Brewing Co.* v. *United States, supra; Ammerman* v. *United States, supra; United States* v. *Smith* (D. C.), 152 F. 542; *United States* v. *Cleveland* (D. C.), 281 F. 249; *United States* v. *Dembowski* (D. C.), 252 F. 894.

"Judgment reversed."

The distinction between Sections 550 and 551 is derived from the common law. Section 550 itself defines an accessory before the fact in substantially similar fashion to the common law. Section 551 does not specifically define an accessory after the fact, but the simple definition of that crime at common law was, knowingly concealing the crime or the criminal after the commission of the crime. Wharton, Criminal Law (12th Ed.), Sec. 281; Brill, Cyc. of Criminal Law, Sections 243-244; *Skelly* v. *United States*, 76 F. (2d) 483, 487 (10th Cir.).

Under the provisions of these statutes, Sections 550 and 551, and the principles of the common law adopted thereby, the guilt or innocence of an alleged accessory before the fact depends in the present case upon his actions and intent before and on March 15, the date on which it is charged that Johnson unlawfully attempted to evade his tax by filing a false income tax return. On the other hand, the guilt or innocence of an accessory after the fact would depend in the present case upon his actions and intent after March 15.

If it should be contended that the counts are not duplicitous and only charge aiding and abetting before the fact of crime, then they should be held invalid as stating a confused interweaving of legal and actual impossibilities. Thus, the first three counts would charge that the accessories aided and abetted the crime continuously for

years after it had been committed, a legal and actual impossibility; and the fourth count would charge that they concealed Johnson and/or his alleged income for a period of fifteen months before the crime was committed. It was not a legal offense to conceal Johnson before he committed any crime and it was of course both a legal and actual impossibility to conceal a crime before it had been committed.

The principles of the common law have generally been adopted by statutes of the States as well as those of the Federal Government, and the distinction between accessories before and after the fact has been recognized by the highest authority. Judge Cardozo, speaking of one convicted of murder, said in *People* v. *Galbo*, 218 N. Y. 285, 112 N. E. 1041, 1045:

"If all that he did was to help the murderer to escape he was not a principal but an accessory" after the fact, citing *People* v. *Farmer*, 196 N. Y. 65, 89 N. E. 462.

In the Farmer case, the court said "but the assisting in the secreting of the body after death would not make him a principal but would only leave him liable as an accessory after the fact".

The prejudice to these respondents in the erroneous joinder of charges is not theoretical but actual. The present indictment does not inform the defendants, the trial court, counsel, nor the jury whether the defendants are charged as principals (accessories before the fact) and liable to have punishments of five years' imprisonment and/or $10,000 fine on each count, or as accessories after the fact and liable only to punishment not exceeding two and a half years and/or $5,000 fine on each count. In addition, of course, the defendants are not apprised by the indictment as to the nature of the evidence to be presented by the prosecution, that is, as to whether it would be evidence as to aiding and abetting in the commission of

the crime itself or as to whether it would be evidence of concealing the alleged criminal and/or his alleged crime after its commission.

Moreover, it may very well be that the jury convicted on the theory that the aiders were guilty of concealing the alleged crimes of Johnson after commission, while the trial court punished the defendants on the assumption that they had been found guilty by the jury of being accessories before the fact. Cf. *Pierce* v. *U. S.*, 86 L. Ed. 238 (Dec. 8, 1941).

The claim of surplusage. The government in effect, admits that these counts are not correctly drawn against the aiders but seeks to evade the consequences of the faulty pleading by claiming that the allegations of time describing the period after March 15 in each instance are surplusage (Brief, p. 48).

The brief of the government seems to avoid entirely any justification for the use of the word "conceal" in the indictment[1]. This word is nowhere found in the definition of offense of being accessory before the fact and is almost invariably found in the definition of the offense of being accessory after the fact. The contention that these allegations are surplusage and the suggestion that substitution of important words be permitted, seems to ask for an amendment of the indictment forbidden by the Constitution. *Ex parte Bain*, 121 U. S. 1, 30 L. Ed. 849.

The government's pleas of surplusage are obviously an afterthought. Consideration of the indictment, the bill of particulars, and the evidence introduced at the trial, all strongly indicate that the prosecution was desirous of proving concealment of Johnson's alleged offenses after their commission. Thus, the overt acts in the conspiracy count set forth numerous acts of alleged concealment by

1. The government suggests that the word "conceal" in the indictment be read as "counsel" (Brief, p. 43, n. 20).

the various defendants after the gambling houses shut down and ceased doing business in September, 1939. Whether these acts of concealment were properly designated overt acts is doubtful.

Acts of concealment also form a substantial part of the bill of particulars. All the convicted aiders are charged to have committed many acts of concealment after the gambling houses had closed in September, 1939, at which time, of course, the alleged income therefrom to Johnson ceased. This also was long after the commission of the alleged offenses in the first three counts by Johnson, which are charged to have occurred on March 15 of 1937, 1938, and 1939. Thus, the bill of particulars states that Sommers in December 1939 made a false statement to certain Internal Revenue Agents (1 R. 77), that in January and February of 1940 Sommers testified falsely before the Federal Grand Jury in order to conceal Johnson's income; that Kelly made a false statement to an Internal Revenue Agent in January 1940 and testified falsely before the Grand Jury in January and February of 1940 (1 R. 86); that defendant Hartigan made a false statement to an Internal Revenue Agent in December 1939 and gave false testimony before a Federal Grand Jury in January and February 1940 (1 R. 94); that Brown fled from Chicago in November 1939 to avoid disclosures to Internal Revenue agents, and agreed with Bernice Downey to remove, conceal and destroy some records of the currency exchange operated by them and gave false testimony before the Federal grand jury in January and February 1940 (1 R. 101).[1]

The claim of surplusage is defeated also by the nature of a large part of the evidence introduced by the prosecution at the trial, manifestly intended to show concealment

1. Creighton who was acquitted by the jury was charged in the bill of particulars with giving false testimony before the Federal grand jury in August 1939 and January and February 1940 (1 R. 82).

of many of Johnson's alleged acts, rather than aiding and abetting in the filing of false income tax returns.

Thus, although Kelly closed down his gambling business in May 1939 except for "a few days in October" (3 R. 878) and Hartigan (2 R. 465) and Sommers (2 R. 471) closed their places in September 1939, as did Brown his currency exchange (3 R. 624), nevertheless statements were taken from each of the defendants by the government officers in December 1939 and January 1940 and offered in evidence by the prosecution against these defendants (Hartigan 2 R. 462; Sommers 2 R. 467; Brown 3 R. 614; Kelly 2 R. 458).

As each of these respondents was out of business at the time the statements were taken, manifestly they were not contributing to Johnson's income, even assuming the government's theory were correct, and certainly they were not aiding and abetting Johnson's alleged offenses in the first three counts, charged to have been committed in March of 1937, 1938 and 1939 respectively. The defendants therefore at this time were not, even under the Government's theory, acting as accessories before the fact. Acts done after a crime to carry out its purpose, do not constitute the doer an accessory before the fact. *Rizzo v. U. S.*, 275 Fed. 51, 52. The only connection of their statements with Johnson's affairs was on the theory that the statements were attempts to conceal Johnson's share in the alleged ownership of the gambling houses theretofore operated by defendants. The statements were not admissions as they contained no admissions against interests of these respondents but were consistent with the individual income tax returns theretofore filed by each defendant, which the Government also claimed are false. Apparently then the statements were offered by the prosecution on the theory that they were acts by defendants of concealment of Johnson's ownership and past income from gambling houses. This is ap-

parent from the course of examination in all the statements, particularly that of Brown. A large portion of the statement (grand jury examination of Brown) was devoted to efforts to obtain evidence against respondents and intimations by the prosecutors of Brown's alleged concealment of Johnson's interests and transactions. (3 R. 614). Thus, Brown was interrogated by the prosecutors as to: whether he did not know that the records of the Currency Exchange were evidence similar to the gun with which a man is killed; (3 R. 628), whether he should not have saved the records of the Currency Exchange as of value to the Government; (3 R. 628), whether Brown had been cautioned to save the records of the Currency Exchange; (3 R. 629), whether someone "behind the scenes" had been telling Brown what to do during the last two or three months; (3 R. 636), whether someone told Brown what records to keep and what to destroy; (3 R. 658), whether Brown burned all the evidence relating to the gamblers except money orders; (3 R. 673), whether Johnson was ever in the Currency Exchange; (3 R. 674), whether Johnson ever purchased any money orders; (3 R. 675), whether Johnson purchased a check for $36.20; (3 R. 680), whether Hartigan did not work for Johnson (3 R. 681).

To summarize, therefore, we submit it is incontrovertible from a consideration of the numerous allegations of the indictment and the bill of particulars, the charge of the court, as well as the many items of so-called evidence introduced by the prosecution at the trial, that reliance on acts of concealment or failure to disclose guilt after the alleged crime, formed an important part of the case which the prosecution presented and by which it persuaded the jury to return the verdict of guilty and that, therefore, the claim now advanced that these allegations of the indictment should be rejected as surplusage, should not be approved by this court.

Inasmuch therefore as the verdict on the first four counts is based on a combination of two charges, one of which at least is invalid, and as it is uncertain on which charge the verdict is based, the convictions cannot stand. *Pierce* v. *U. S.*, 86 L. Ed. 238 (Dec. 8, 1941); *Stromberg* v. *California*, 283 U. S. 366, 368, 75 L. Ed. 1117, 1122; *Nash* v. *U. S.*, 229 U. S. 373, 57 L. Ed. 1232.

The great confusion in the indictment, bill of particulars, the evidence and the charge of the court, with resulting embarrassment and prejudice to respondents, was increased by the duplicity of charges against Johnson. Each of the first four counts charged an attempt to evade taxes by filing a false income tax return on March 15th of each year. This constitutes an unlawful attempt under the Revenue law. (*U. S.* v. *Rachmil*, 270 Fed. 869, 871.) These counts also charge failure to pay tax on March 15th, which is also probably an unlawful attempt, but a different one from that of filing the return. Therefore, there is duplicity here. Also, the counts charge as a means of the offense of attempting to evade taxes the making of a false return (not the filing) and the failure to keep records. These are not criminal attempts. (*U. S.* v. *Rachmil*, 270 Fed. 869, 871.) Therefore, they are charges of offense which are misdemeanors under Section 145(a) of the Revenue Act in question. Thus, against Johnson are charged two distinct attempts which are felonies and two distinct other offenses which are misdemeanors. It follows, therefore, that these respondents are charged with aiding and abetting two distinct felonies of the principal defendant alleged to have been committed on March 15th of each year and two distinct misdemeanors, one committed shortly before March 15th and the other committed continuously over a long period of time not specified in the indictment but evidently consisting of a combination of two periods, one period the same period of one year and two and one-half months *before* March 15th of each year and a period varying from about

two weeks in the fourth count to more than three years in the first count *after* March 15th of each year.

Which one or more of these offenses the jury considered proved against these respondents is a matter of utter speculation and conjecture.

The uncertainty as to the basis for the verdict is increased by consideration of the trial court's charge which gives indications of suggestion by the prosecution.

The charge, 3 R. 1013-1014, in its reference to the aiders mentions several supposed elements of the offense of attempt to evade taxes, such as carelessness or negligence, shutting one's eyes to obvious facts, failure to use intelligence that one has, etc. No time was mentioned in the charge in this connection. These conditions in the nature of omissions were not elements of the offense of wilful attempt. The jury may well have supposed however, that carelessness or negligence or shutting one's eyes, after the fact of Johnson's supposed crimes, would support a verdict of guilt. Therefore, under the doctrine of *Pierce v. U. S.*, 86 L. Ed. 238 (Dec. 8, 1941) and like authorities, the verdict should not stand.

B. *The first four counts failed to charge violation of the appropriate internal revenue law by the aiders.*

The indictment purports to charge these respondents, as stated before, under the statutes of general application punishing accessories before and after the fact (18 U. S. C. A. 550, 551). However, it appears that Sec. 550 regarding accessories before the fact has been superseded by 26 U. S. C. A. 3793(C)(b)(1) providing that:

> "Any person who willfully aids or assists in, or procures, counsels or advises, the preparation or presentation under, or in connection with any matter arising under, the Internal Revenue laws, of a false or fraudulent return * * * shall * * * be guilty of a felony * * *."

As this statute is an enactment of later date and of more specific application than Sec. 550 with respect to the acts of these defendants, under familiar law, it supersedes them and is exclusively applicable. *Yuganovich* v. *United States*, 256 U. S. 450; *Lewis* v. *United States*, 280 Fed. 5, 6 (6th C. C.); *Wood* v. *United States*, 16 Pet. 342, 363.

The substitution of Sec. 3793 for Sec. 550 in charging the aiding in the preparation and presentation of false income tax returns has been recognized by use in the Second Circuit, *United States* v. *Kelley*, 105 Fed. (2d) 913.

The purpose of this sub-division of Sec. 3793 was stated in Senate Report No. 8226, page 45, regarding the Internal Revenue Act of 1924 in Sec. 1117(d), as follows:

> "This sub-division, which was not contained in the House bill, provides a penalty for the offense of aiding in the preparation, presentation, procurement, counseling or advising of a false or fraudulent return, affidavit, claim or document authorized or required by the Internal Revenue laws. It is designed to discourage specifically the presentation of false returns and claims to the Department."

The existence of this sub-division of Sec. 3793 makes even more evident the duplicity in the charges against these respondents in the present indictment. Manifestly, the charge of concealment after March 15th in each year is that of a different offense than the one described in Sec. 3793.

This defect in the indictment was gravely prejudicial to these respondents. Under charge of assisting in preparation and presentation of a false return, the prosecution could not have included allegations that these respondents concealed the crime and or the criminal for a period of years after the presentation of the return on March 15th.

III.

(A) There Was No Evidence of Any Intent or Act of Respondents to Aid Johnson's Alleged Attempts to Evade Taxes.

(B) There Was No Evidence of Conspiracy to Defraud the United States of Johnson's Income Taxes.

(A) *Lack of Evidence as to Substantive Counts.*

As to these respondents, there was a fatal absence of any evidence that they had any connection whatever with Johnson's income taxes or returns or knew anything about any of these matters or had any intention to aid or assist Johnson in his alleged attempts to evade his taxes. The gist of the unlawful attempts charged against Johnson was that he filed false income tax returns understating his income each year for four years. Of course, the case of the prosecution against these respondents failed without proof that respondents committed acts which had a direct, rather than a coincidental connection with the alleged attempts.

The government brief evades the issue by arguing that in other indictments in other cases the attempts to evade taxes were charged to have been made by means other than by filing false returns. Needless to say, the prosecution is bound by the charges which it makes in this indictment and by which the defendants presumably are informed as to the nature of the accusation against them. We emphatically take issue with the statement of the government brief that the Court of Appeals misunderstood the charges in the first four counts. A glance at the majority opinion clearly disproves such contention.

The case of *Coffin* v. *United States*, 162 U. S. 664, 679, 40 L. Ed. 1109, 1115, clearly indicates the necessity for

direct connection of the alleged aiding with the principal's crime. There the principal defendant, one Haughey, was charged with making a false entry in the books of a bank with intent to defraud, and the other defendants were charged with aiding and abetting. The trial court instructed the jury that the aiders and abetters could not be found guilty unless the jury was satisfied that they did or said something to show their consent to and participation in "the unlawful and criminal acts of Haughey and contributing to their execution." It was objected that the expression "unlawful and criminal acts" might have been understood by the jury as relating to the unlawful and criminal acts of Haughey generally. This court gave careful consideration to the point, indicating that the instruction if so understood would have been erroneous, but said after reviewing other portions of the instructions that the expression "unlawful and criminal acts" could only have been understood by the jury as having reference to the acts of Haughey attendant upon and connected with the making of the entry.

In *Kelley* v. *United States*, 105 Fed. (2d) 913 (2d Cir.), three defendants were convicted under section 3793(C) (b)(1) for assisting in the preparation and presentation of fraudulent income tax returns. The Court of Appeals in its opinion indicated it attached much importance to the evidence showing connection of defendants with the returns, by discussing such evidence in considerable detail.

It should be remembered that in the instant case the only offense which the government claims is stated in the indictment is that of an attempt to evade taxes by the filing of a false return in each of the first four counts. Although aiding in the preparation of a false return might be an offense under section 3793 (C) (b) (1), it is not an attempt to evade taxes under section 145 (b) (1) on which the present indictment is based.

In the case of *United States* v. *Rachmil*, 270 Fed. 869, 871, Judge Knox (D. C. N. Y.) said at page 871 that the preparation of a false return, the signing of it by the taxpayer, and the acknowledgment of signature by the notary public did not constitute an attempt to defeat and evade taxes but that the filing of the false return did constitute such an attempt. He said at page 871, "When, however, a step which has for its purpose nothing less than an attempt to defeat the income tax laws has taken place, namely, the filing of the return with the Collector of Internal Revenue, the act denounced by the income tax laws is complete. I say this because the return is then placed beyond the control of the defendant and the Collector in usual course will use such return as a basis of assessing the tax. The attempt of the defendant, if the return be false and fraudulent, is complete." This decision was cited with approval by this Court in *United States* v. *Novick*, 273 U. S. 202, 206, 70 L. Ed. 610, 612.

In the case of *Seiden* v. *United States*, 16 Fed. (2d) 197 (2d Cir.), it was held that the manufacture of liquor illegally is not an attempt to remove it without payment of tax. There the defendant was more closely connected with the crime than the alleged aiders in the case at bar. Manifestly, the manufacturer of the liquor makes it possible to remove the liquor. Nevertheless, unless he is actually connected with the removal, his previous illegal acts do not render him guilty of the later crime.

In *Hills* v. *United States*, 97 Fed. (2d) 710, 712 (9th Cir.), it was said that the purpose of the accessory to aid the principal does not make him guilty unless that purpose of the accessory resulted in an act of the accessory which actually aided the principal in the commission of the crime charged. In the present case there was neither such purpose nor such aid.

Numerous cases are found in which the participation of

charged aiders was held to be insufficient to fasten criminal responsibility upon them. In all these instances the connection was much more direct than in the case at bar. Thus, in *Yenkitchi Ito* v. *United States*, 64 Fed. (2d) 73, 75 (9th Cir.), alleged accessories were charged with aiding and abetting the principal offenders in bringing aliens with intent to land them illegally from Mexico, to a point 40 miles from the mainland of the United States, where officers prevented further progress in crime. It was held that this did not constitute either an attempt to land the aliens or aiding and abetting therein.

In *Pontiff* v. *United States*, 9 Fed. (2d) 29, the defendant, with his automobile, went to a place where he expected others to land liquor illegally, remained there for some time, and then left, abandoning his car, when he learned that officers were present. A few hours later liquor was illegally landed at the place and seized by the officers. However, it was held that the proof was not sufficient to show an aiding and abetting of the offense of illegally transporting the liquor.

Another vital element closely related to that just discussed is the element of intent on the part of respondents that Johnson should evade his income taxes and that they should assist him in so doing. Evidence of this intent is entirely lacking in the record. It hardly needs citation of authority to establish the fact that proof of such intent is necessary here.

Where a statute denounces as criminal only the willful doing of an act, a specific wrongful intent is of the essence, that is, actual knowledge of the existence of an obligation and a wrongful intent to evade it. *Potter* v. *United States*, 155 U. S. 438, 39 L. Ed. 214; *Spurr* v. *United States*, 174 U. S. 728, 43 L. Ed. 1150; *Murdock* v. *United States*, 290 U. S. 389, 78 L. Ed. 381.

Willful intent is one of the essential elements in proof

of evasion of income taxes. *Malone* v. *United States*, 94 Fed. (2d) 281 (7th Cir.), *Hargrove* v. *United States*, 67 Fed. (2d) 820 (5th Cir.).

Where an act must be knowingly and willfully done to be criminal, not only a knowledge of the act is implied but a determination with a bad intent to do it. *Bentall* v. *United States*, 262 Fed. 744, 746; *Felton* v. *United States*, 96 U. S. 699, 702, 24 L. Ed. 875; *Hicks* v. *United States*, 150 U. S. 442, 449.

None of the elements of wilfulness, intent to evade Johnson's taxes, or even knowledge of Johnson's income tax returns, on the part of these respondents is shown by the evidence here.

In the case of *Hicks* v. *United States*, 150 U. S. 442, the defendant was convicted as an aider and abettor in a murder. The proof showed that immediately before the actual killing the actual murderer threatened the victim with a gun but Hicks, a companion of the murderer, stood by and directed abusive and threatening remarks to the victim. The trial court instructed the jury that to render Hicks guilty the jury must find that his comments encouraged and inspired the murderer. This court held that this was insufficient in that it failed to advise the jury that the words must have been used by the aider with the intention of encouraging and abetting the murderer.

In the present case there is no evidence that Johnson and any of these respondents ever talked together about his income, his income taxes or tax returns. There is not a proven circumstance which even tends to bring home to these respondents knowledge of Johnson's income or reports. All of the direct testimony is that they had no knowledge.

Therefore, even if Johnson were guilty of a criminal attempt to evade his income taxes and the acts of these defendants in fact aided him in that attempt, there is no

proof here that the accessories had knowledge of or participated in Johnson's alleged illegal intention. In other words, if there was aid and assistance by the alleged aiders to Johnson's alleged unlawful attempts, such aid and assistance, was merely coincidental and not intentional or willful.

In *Firpo* v. *United States*, 261 Fed. 851, it was held that one does not assist a deserter from the Army in his desertion by merely advising him to stay away from the authorities.

The recent and authoritative case of *Falcone* v. *United States*, 311 U. S. 205, 61 S. C. 204, is instructive here. There this court indicated that the acts of one of the defendants in concealing his identity in purchasing yeast would not be considered as showing guilty knowledge to distill liquor illegally but would rather be attributed to a mistaken belief by the defendant that it was a crime to sell yeast to distillers.

The Court of Appeals was clearly right in holding that a verdict of not guilty should have been directed as to the alleged aiders and abettors under the first four counts.

(B) *Lack of Evidence to Show Conspiracy Participated in by These Respondents.*

The Court of Appeals erroneously decided that the evidence in support of the fifth or conspiracy count was sufficient to go to the jury. A similar failure of proof to that already demonstrated with respect to the first four counts obtains regarding the fifth count. There was no evidence of any meeting of the minds of any of these respondents with Johnson for the purpose of enabling him to defraud the Government in connection with his income taxes. The Court of Appeals evidently was confused by the evidence of friendly and harmonious acquaintanceship between the respondents and Johnson and each other while

visiting the houses conducted by these respondents. There is no evidence, however, even suggesting that such casual and occasional co-operation was directed toward the end of evading Johnson's income taxes. It should be noted in this connection that the accountants, Radomski and Brantman, who did the actual work of preparing the income tax returns for Johnson were used as witnesses by the prosecution (2 R. 93, 419) but there was no testimony from these accountants or any other witnesses that these respondents had anything to do with the making of Johnson's income tax returns or knew anything about the contents, much less the accuracy or inaccuracy thereof.

In the *Falcone case*, *supra*, 311 U. S. 205, 61 S. C. 204, it was held that knowledge by merchants selling supplies to illicit distillers that such supplies would be used in illicit distilling was not proof of conspiracy between such merchants and such distillers. This court ruled that there must be actual meeting of the minds of defendants in the conspiracy charged and actual participation by the defendants in the conspiracy charged. So in the present case, no conspiracy is shown and no participation by these defendants. Even if respondents had knowledge that Johnson was receiving some income from the gambling houses, as contended by the government, there is not a scintilla of evidence that they knew as to whether or not he was reporting this in his income tax returns. Needless to say, a scintilla of evidence would not support a tax assessment in a civil case. *Rhodes* v. *Commissioner*, 100 F. (2d) 966, 969 (6th Cir.).

Another authoritative decision is found in the case of *Peoni* v. *United States*, 100 Fed. (2d) 401 (2nd Cir.). There, Peoni sold counterfeit money to a second person, who in turn sold it to a third person. It was held by the Court of Appeals that Peoni was neither an accessory to unlawful possession of the third person nor was he in conspiracy with him, although the Court called attention to

the fact that undoubtedly Peoni knew that the counterfeit money would be possessed by some third person and was indifferent thereto.

In short, we respectfully submit there was an entire failure of proof to show any illegal intent, plan or combination involving these defendants in any way with the matter of Johnson's income taxes, income tax returns or income tax payments.

The Government's brief states that the evidence against these respondents is summarized in the Statement, pages 4-10 of the brief. The entire Statement is devoted to a recital of circumstantial evidence which the Government contends showed "ownership" (whether total or partial not stated) of the gambling houses by Johnson. The Court of Appeals summarized and analyzed this evidence as showing at best an indefinite interest (1 R. 195):

> "We have carefully examined the testimony on this theory of the Government's case, and we are of the opinion that, considering it in the light most favorable to the Government, as we must do, the most that can be said is that the proof discloses Johnson had an interest in the gambling houses. The evidence does not show that he was the sole owner and therefore entitled to all the proceeds. The Government's contention on this theory of the case must rest upon the assumption that he owned the entire interest in the houses, that the total of all the business transactions at the currency exchanges and banks represented income from such houses, and that such income was paid to Johnson. It is not claimed that there is any proof that Johnson actually received this income. Such fact, if it be a fact, must be inferred from the other assumptions which we have mentioned. As already stated, Johnson reported a large income from his gambling transactions for each of the years in question, and to say that his interest in the gambling houses was such as to entitle him to an income greater than that reported is to indulge in rank speculation. If Johnson had reported no income for those years, a different sit-

> uation would have been presented. We have no hesitancy in holding that the verdict cannot be supported upon this theory."

The Government's brief seems to evade this most important issue. Nowhere does the brief expressly say that the evidence shows Johnson to be the *sole* owner of the gambling houses nor that as such he was entitled to and presumably received *all* the income from approximately eight gambling houses conducted by the respondents Sommers, Flanagan, Kelly and Hartigan respectively.

Government counsel list in their brief the many gambling houses that were operated by Creighton, as well as those operated by Wait, Mackay and others, but they omit to exclude the aggregate of the financial transactions of these houses when they state Johnson's alleged income from them, notwithstanding the acquittal of Creighton, Wait and Mackay.

Assuming, arguendo, that the circumstantial evidence of the Government indicated an indefinite proprietory interest of Johnson in some of these gambling houses, there is a total failure of proof of the extent of that interest and of the knowledge of the several respondents of Johnson's interest, if any, in the houses of the others respectively.

How trifling the circumstances were on which the Government relies will appear from a brief analysis:

Johnson was shown to be instrumental in securing employment for approximately nine or ten persons in these gambling houses during a period of more than four or five years (2 R. 222, 225, 276, 309, 312, 315, 322, 328, 387, 396). During this same period the houses in question undoubtedly employed hundreds, possibly thousands, of persons.

In each instance, where gambling houses were located in buildings owned by Johnson, rent was paid by the tenant to Johnson or his real estate agent or representative (2 R. 14, 2 R. 950) and this rent was always returned as income by Johnson.

Two carpenters, Anderson and Schultz, who worked at the gambling houses also did some work on Johnson's farm (2 R. 128, 132—2 R. 135, 240). The respective proprietors paid for the work at their gambling houses and Johnson paid for the work at his farm.

Johnson installed air conditioning in the D & D Building where several tenants, in addition to Kelly, had been unsuccessful in other lines of business (2 R. 17-18, 27-28). Kelly was treated exactly the same as other tenants in respect to rent adjustments. If Kelly was an employee, and not a tenant, Johnson could have concealed the relationship better by waiving no rent as to Kelly.

In 1935, Johnson talked to some one about the rate or price for nation-wide news service. Flanagan made the appointment for himself over the telephone but when the witness arrived at the appointed place Johnson was there (2 R. 153). In 1938 the same witness had a conference regarding these rates with one Ragen and Flanagan (2 R. 153). Flanagan was a regular patron of Nationwide but Johnson never had an account with it.

An accountant testified that Johnson directed him to install an accounting system in the Lincoln Tavern dining room and bar (2 R. 305) but not in the gambling establishment there. Wait testified that he was the proprietor and ordered the service. Hartigan ran a gambling room in the same building.

Johnson once offered to refund the bet of a witness who had lost $10.00 or $15.00 at dice when the latter complained (2 R. 379-380).

A woman gambler testified that Sommers reduced the gambling limit on Red and Black and when she complained Sommers told her to see Johnson. She testified she went to Bon Air to complain to Johnson and that he told her he would have the limit restored. However, Sommers did not restore the limit (2 R. 572).

When Hartigan rented the Harlem Stables, he was not present, being ill, when the claims of some former occupants were settled for furniture and property which they claimed to have left in the place previously (2 R. 283, 290, 3 R. 804-807). They testified they were paid $200.00. Even if this came from Johnson, which seems uncertain from their testimony (2 R. 286), and which was denied by several witnesses present, it is a trivial incident in no wise tending to prove ownership of the gambling house.

The preceding short paragraphs, we believe, are fair samples of the evidence on which the Government relies to show that Johnson was the *sole* owner of the gambling houses operated by these respondents and on which it bases the presumption that he received therefrom during the period of four years an enormous amount of money.

The stress laid on "concerted operation" of the gambling houses, is without force as regards ownership. Concerted operation indicates friendly relationship of respondents and business-like and economical operation of the gambling clubs by these respondents. This evidence in no wise points to ownership by Johnson.

In holding that there was a jury question as to the fifth count, the Court of Appeals failed to apply to this count its previous proper and accurate finding that the evidence, at its strongest, left a hiatus between proof of possibly some indefinite proprietary interest of Johnson in the gambling houses and the total ownership necessary to sustain the Government's theory, leaving without support the presumption that Johnson received a tremendous sum of money, presumed to be income, from the houses. Incidentally, of course, this triple presumption that Johnson was the sole owner, that as such sole owner he received enormous sums of money and that such money was taxable income, is rebutted not only by the testimony of Johnson (3 R. 950, 951), Sommers (3 R. 810), Flanagan (3 R. 931, 932)

and Kelly (3 R. 879) at the trial (as well as Creighton (3. R. 858) and Wait (3 R. 896) who were acquitted) and by the statement of Hartigan (2 R. 466) but by the income tax returns of all these respondents, except Brown who did not operate a gambling house. There is a total failure of proof that Johnson ever received a dollar from any of these respondents.

The conspiracy charged in the indictment to defraud the United States of the income taxes upon Johnson's income could only have been established by evidence that Johnson's income from the gambling houses would be and was greater than that reported in his returns and, therefore, that a greater tax than that paid would be due, that these respondents knew that such excess of income would and did exist and that, with knowledge of that fact, they agreed with Johnson and each other that Johnson should make returns understating his income and should omit and fail to pay the full amount of tax due.

As pointed out by the Court of Appeals (1 R. 195), there was no proof that Johnson's income actually exceeded the large amount reported in his returns nor that his tax was actually larger than that which he paid each year. This is conclusive of the conspiracy count. It is a mere appendage of the four counts charging attempted evasions. There may be a conspiracy to commit an offense which is never committed; but that is not this case. If the Government has failed to prove under its gambling house ownership theory that Johnson had a larger income than he reported, it has likewise failed to prove the conspiracy charged. The Court of Appeals was right in holding that the claim that Johnson received from the gambling houses of these respondents more income than he returned was pure conjecture. The same must be said of the charge of conspiracy.

The mere choice of probabilities does not constitute evidence and should not be submitted to the jury; nor does

the placing of inference on inference or presumption on presumption constitute a sufficient basis for a determination of facts. *Pennsylvania R. R. Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819; *U. S. v. Ross*, 92 U. S. 281, 283, 23 L. Ed. 707; *Alexander v. Standard Acc. Ins. Co.*, 122 F. (2d) 995, 997 (8th Cir.); *Parker v. Gulf Ref. Co.*, 80 F. (2d) 795 (6th Cir.).

In this connection, if Johnson's expenditures exceeded his reported income, as assumed by the Government, this would be immaterial so far as the aiders are concerned for several reasons. First, they had no knowledge of his total actual income or of his total actual expenditures. Second, at least so far as the aiders are concerned, it must be presumed that the expenditures of Johnson, if made in the amounts contended by the Government, were made from income received by Johnson in 1935 or previous years, or from other resources.

The entire computation by the Government is built basically upon Johnson's alleged statement in the nature of an admission to revenue agents in January, 1934 to the effect that as of December 31, 1931, Johnson had $78,000 in money. Needless to say, this oral statement should not have been received or considered against the aiders. If it were an admission of Johnson as claimed by the Government, it was of course binding only on himself and not at all upon the aiders.

Similarly, the income tax returns of Johnson are clearly not proof against the aiders. A return is a statement by the maker which possibly may be considered as an admission against him but is of course hearsay as to third parties. *Greenbaum v. United States*, 80 Fed. (2d) 113-115 (9th Cir.).

Logically analyzed, the government's position is that Johnson's income tax returns are presumed to be truthful and accurate for the years 1932, 1933, 1934 and 1935, when

the returned income was relatively small, and are presumed to be false and inaccurate for the years 1936, 1937, 1938 and 1939, when the income returned reaches a quarter million dollars a year. Whatever force this contention might have as against Johnson, (and we cannot see how it has any,) it is utterly fallacious as applied against these respondents.

On the contrary, the aiders are entitled to exactly the opposite presumption than that contended for by the government, viz., the presumption of innocence would require the presumption, so far as respondents are concerned, that Johnson had other resources than his current income to meet the large sums which the government claims he expended in 1936, 1937, 1938 and 1939.

We submit, therefore, that the evidence was clearly insufficient to support the fifth or conspiracy count and that both the Court of Appeals and the District Court were in error in holding to the contrary.

IV.

The Court of Appeals Did Not Weight the Evidence Nor Decide the Credibility of Witnesses.

We respectfully take issue with the contention of the government that the Court of Appeals substituted its views for those of the jury as to the weight of the evidence and the credibility of witnesses in ruling on the substantive counts.

In not a single instance has the lower court invaded the province of the jury. In every instance where that court held the evidence insufficient, it has pointed to an absolute lack of evidence. Nowhere in the majority opinion has the government pointed out a statement that a witness was not credible or that the evidence was not of sufficient weight.

The government brief bases its contention on this point

upon the holding by the Court of Appeals that the evidence of the government did not show entire ownership of the gambling houses by Johnson and, therefore, did not support the inference that the entire gambling house income went to Johnson.

The government brief seems to avoid saying that the proof showed sole or entire ownership of the gambling houses by Johnson or that Johnson received all of or the entire alleged income therefrom, although this is the only logical basis for the theory of the prosecution, as shown by the Court of Appeals opinion.

The cases cited by the government on this point are not applicable. In *Wexler* v. *U. S.*, 79 Fed. (2d) 526 (2d Cir.) the defendant reported only a "trifling income." The income charged against him was over $2,000,000 per year deposited in accounts under fictitious names, in which accounts the defendant mingled his own funds. The monies in these accounts were used, in some instances at least, for his personal benefit, such as by the purchase of an automobile for himself and the payment of money to a corporation whose debts he had guaranteed. His expenditures also exceeded his reported income.

In *Gleckman* v. *United States*, 80 Fed. (2d) 394, the defendant reported gross income for 1929 of $11,167. The evidence of the prosecution showed bank deposits to his credit exceeding $150,000 in that year. Written property statements made by him to banks indicated that his net worth increased from $64,000 in October, 1929, to $217,000 in March, 1930.

Thus, in both the Wexler and Gleckman cases there was definite, positive proof of the receipt of large sums of money exceeding greatly the amounts reported in returns. Wexler was the owner of a brewery and Gleckman was engaged in several different kinds of business. The inference, therefore, was that such deposits as were made in

the bank accounts of the taxpayers would be presumed to be income (in the absence of contrary proof) because of the fact that the deposits were from proceeds of the businesses owned by the taxpayers. There was no attempt by the court to presume from the fact that these taxpayers were engaged in business how much they received from the respective businesses. In other words, the presumption did not go to prove the existence of a definite amount of income from an indefinite participation in business. The excess of wealth in possession in each case was clearly proved to be much greater than that reported in the returns as income. The reference to business in the opinions was merely to support the presumption that the wealth was received during the current year, that is, that it was income. Whatever application, if any, this doctrine might have in support of the expenditure proof as against Johnson, it certainly has none as against these aiders on the gambling house ownership theory.

Assuming, as the Court of Appeals has done, that all the evidence of the government was true, and making all reasonable inferences and presumptions based thereon, the record still leaves unanswered and subject to speculation two questions, the answers to which were vital to the success of the prosecution and without which answers the prosecution necessarily fails. These questions are: First what was the extent of Johnson's interest in the gambling houses? Second, what was the amount of income, if any he received from the gambling houses?

If the government means to suggest that the lower court weighed the evidence or decided credibility of witnesses, in holding that there was no connection shown of these respondents with Johnson's income tax returns, such suggested contention is without basis. As we have demonstrated elsewhere, there was no evidence of any connection of these respondents with Johnson's income tax matters or returns or taxes. As heretofore noted, the government's

brief fails to point out any such connection of these respondents with Johnson's income tax matters or any knowledge on their part of the alleged fact that Johnson was not reporting his full income and paying his full tax.

V.

The Verdict Against These Respondents Was Invalidated by Improper Extra-Judicial Statements and Innuendoes of the Prosecutors Which They Placed Before the Trial Jury.

This claim of error was not discussed by the Court of Appeals. However, as we understand this court has taken the entire case and may, if it sees fit, decide the case upon the merits, without confining itself to the limits of the opinion of the Court of Appeals, we respectfully submit that in justice to these respondents attention should be called to what we consider the grievious errors herein discussed in this section. These errors consisted of the introduction in evidence of so-called statements made by respondents upon examination of them respectively by Internal Revenue agents and by the prosecuting attorneys.

The law is well settled that statements incriminating an accused person, made in his presence, but which are denied by him, are inadmissible against him. *People* v. *Pfanschmidt*, 262 Ill. 411, 104 N. E. 804, 819; *People* v. *Harrison*, 261 Ill. 517, 104 N. E. 259, 261; *Com.* v. *Trefethen*, 157 Mass. 180, 31 N. E. 961; Underhill on Criminal Evidence (2nd Ed.) Sec. 122.

In the case at bar the so-called statements of respondents Sommers, Hartigan, Kelly and Brown (3 R. 467, 462, 458, 614) were introduced in evidence. These statements consisted of denials by the respective defendants of any interest or ownership of Johnson in their respective businesses. Inferentially, the suggestion was conveyed to

the jury by these statements of an interest or ownership of Johnson in those businesses. Thus, the statements of these defendants emphasized the theory of the Government and, in addition, laid stress upon the fact that these respondents were gamblers, upon the details of the conduct of their gambling establishments, etc. (3 R. 467, 462).

The so-called grand jury examination of Brown furnishes a most flagrant instance of the violation of the rights, not only of Brown, but of the other respondents as well. Although the trial court ruled that this examination was only admissible against Brown, its nature and undoubted effect were such that it must have been extremely prejudicial to all other respondents. The so-called testimony of Brown before the grand jury (3 R. 614) was in the nature of a scathing and threatening cross-examination and criticism of Brown by three prosecuting attorneys, combined with critical comments affecting the other respondents and intimations of misconduct on their part. It cannot be doubted that if Brown had been a witness on the stand the trial court would have refused to permit him to be cross-examined in the fashion shown by the transcript which was read to the trial jury. Nevertheless, the trial court apparently overlooked the extremely improper and prejudicial nature of the questions, remarks, threats and suggestions by the prosecuting attorneys, thus presented to the trial jury.

We respectfully submit that the so-called examination of Brown was very similar to that denounced in *Berger* v. *U. S.*, 295 U. S. 78, 87-89. See also, *Little* v. *U. S.*, 93 Fed. (2d) 401 (8th Cir.) and cases cited therein.

Only about one-third of the grand jury interrogation of Brown was admitted in evidence at the trial. This approximate one-third covers about seventy-eight pages of the printed record (3 R. 614-692).

In the taking of this so-called statement from Brown

and its subsequent introduction in evidence at the trial, there was laid before the trial jury the fact that Hartigan, Sommers, Flanagan and Kelly were engaged in the gambling business (3 R. 622) according to Brown's understanding, who had never been in any of their gambling houses (3 R. 659); that Bill Johnson, about twelve years before, was interested in a dog track, according to Brown's understanding (3 R. 637-638); the intimation by the prosecutor that after Mr. Skidmore was indicted, Brown and Hartigan decided to close up the currency exchange (3 R. 625); the intimation by the prosecutor that the indictment of Skidmore was spread forth in the newspapers and that, therefore, Brown knew Skidmore had been indicted about the last of August or the first of September (3 R. 625); the intimation that the records of the currency exchange were criminal evidence similar to the gun with which a man is killed (3 R. 628); the intimation that Brown should have saved the records of the currency exchange as of value to the United States Government (3 R. 628); the intimation that Brown was not telling the truth when he stated that nobody ever cautioned him to keep the records of the currency exchange (3 R. 630); the intimation that Brown would be subject to prosecution for failing to testify truthfully before the grand jury (3 R. 639); the denial by the prosecutor of Brown's testimony that he was summoned before the grand jury (3 R. 650); the intimation by the prosecutor that someone "behind the scene" had been telling Brown what to do during the last two or three months (3 R. 636); the application by the prosecutor to Brown of the sarcastic reference, "Mr. ex-cashier of the Ogden National Bank" (3 R. 645); the intimation by the prosecutor that N. S. F. checks were checks "of suckers who had lost those checks in gambling houses" (3 R. 647); the threat by the prosecutor to take Brown before the Judge on a contempt citation (3 R. 647); the statement by the prosecutor that at a later time he would confront

Brown with letters from the Central National Bank showing the amount of money which the bank was sending to the currency exchange (3 R. 650); the suggestion by the prosecutor that 60% of the business of the currency exchange came from "outlaw business—or these gamblers" (3 R. 652); intimation by the prosecutor that someone assorted the records of the currency exchange and told Brown what to burn and what to keep (3 R. 658); the suggestion that Brown burned all the evidence relating to the business of the gamblers with the sole exception of the money orders or records (3 R. 658); repetition by the prosecutor of the suggestion that Brown knew before the records were burned that Skidmore had been indicted (3 R. 658); the statement by the prosecutor that O. L. Alexander, Mr. Skidmore's brother-in-law, was connected with the Horseshoe gambling house and the Dev-Lin for years (3 R. 658); a third suggestion by prosecutors that Brown knew from the newspapers that the gamblers were under investigation (3 R. 659); the suggestion that Brown was "kicked out of a bank" (3 R. 646); the suggestion that Brown diverted the currency exchange business of the gamblers from Mr. Marcus and that Marcus became disgruntled (3 R. 663).

The rule is of course fundamental that a defendant on trial may not be subjected to the unsworn statements of anyone, much less the attorneys conducting the prosecution, even were such statements relevant to the case. By the procedure here adopted Brown and all of the other respondents were deprived of the opportunity of cross-examination of the attorneys who virtually constituted themselves witnesses against the respondents. The latter were not confronted by such attorneys as witnesses nor were they entitled to give testimony in rebuttal of the many prejudicial inferences, suggestions and statements made by the attorneys. This was reversible error. *Berger*

v. *U. S.*, 295 U. S. 78, 87-89; *Loudon* v. *U. S.*, 149 Fed. 673, 677; *Taliaferro* v. *U. S.*, 47 Fed. (2d) 699, 702.

In addition, a very injurious statement was made by one of the prosecuting attorneys in connection with an alleged statement taken from Johnson which was introduced before the trial jury (3 R. 410).

At 3 R. 418 the attorney concluded the so-called Johnson statement with the folowing extremely prejudicial combination of statements of hearsay information, veiled threats for perjury, and statements that the attorney's information about these places was not "newspaper stuff," etc., viz.:

> "Now, our information again is that you are an interested party in a number of gambling houses around here, and I'm inclined to think that our information will be found to be accurate, so that being the case, your story here this afternoon is not in accordance with our information. Now, I want you to think that over seriously between now and the next time you come down. You'll have a return engagement here, and at that time I think I shall confront you with places. And there's also a penalty for perjury here on these questions and answers. I'm going to caution you about that. The next time you come down here, if you want to stand on your statement given today, it's all right. I'm not threatening you. I want to square up the situation one way or the other, that you do or do not own these places. And that isn't newspaper stuff, either. Do you want to make any corrections or additions to any of your answers?"

Certainly the prosecution cannot contend that these statements of the prosecutor should have been submitted to the trial jury at all, much less without specific cautionary instructions protecting these respondents, regardless of the extremely doubtful question of whether or not they were admissible against Johnson. These statements were, of course, extra judicial and made by the prosecuting attorney in advance of trial and by their repetition before

the jury, the prosecuting attorney was successful in stating his alleged hearsay information to the jury of matters about which he would have been unable to testify even if he had been called as a witness. The statements and charges of the ownership of gambling houses made ostensibly against Johnson were equally prejudicial and injurious to appellants. Thus, in effect, these charges were made against these appellants outside their presence before trial and such charges were allowed to go to the jury without protection to these respondents in the instructions of the court. Requested instruction No. 55 on this matter was refused (3 R. 1030).

These unsworn declarations by the prosecuting attorney pertained to the very vital question in the case, viz., alleged ownership by Johnson of an interest in the gambling houses. In all probability these declarations were understood by the jury as evidence of the facts stated by the attorney.

A brief instruction was given as to the Brown statement (3 R. 1007).[1] However, the error was so grievous and the prejudice so great as to all respondents, including Brown, that we submit its effect could not have been cured by this charge. Cf. *Throckmorton* v. *Holt*, 180 U. S. 532, 567, 45 L. Ed. 663, 671; *Washington Gaslight Co.* v. *Lansden*, 172 U. S. 534, 554, 45 L. Ed. 663, 671; *Turner* v. *American Security & Trust Co.*, 213 U. S. 257, 266, 53 L. Ed. 788, 792. Even a single mistake may be so destructive of the rights of a defendant that a reversal must follow. *Ippolito* v. *U. S.*, 108 Fed. (2d) 668; *Pharr* v. *U. S.*, 48 Fed. (2d) 767.

Here the violation was not a single one but was repeated many times.

Substantial error will invalidate the verdict, particularly in a case such as this where the evidence of guilt, if any, is meager. *Glasser* v. *U. S.*, 62 S. Ct. 457, 463 (Jan.

1. Requested Instruction No. 56 covering the matter somewhat more fully was refused.

19, 1942). Where the evidence of guilt or innocence is sharply contradictory, it is particularly essential that there be freedom from error in the trial. *Ehrhardt* v. *U. S.*, 268 Fed. 326, 328 (7th Cir.); *Gold* v. *U. S.*, 26 F. (2d) 185, 186 (2d Cir.); *Perry* v. *U. S.*, 14 F. (2d) 88, 90 (9th Cir.).

VI.

The Introduction of the Testimony of Witness Clifford Constituted Reversible Error.

Inasmuch as the government has filed but one brief in this case and that of *United States* v. *Johnson*, No. 799, and as the argument on behalf of respondent Johnson, in case No. 799, and that on behalf of these respondents is substantially similar with respect to the error in the introduction of the testimony of witness Clifford and other prejudicial incompetent and immaterial evidence, in the interests of brevity, we respectfully ask leave to adopt the argument in the brief of Johnson on erroneous rulings on objections to evidence and request that the court consider it as if repeated herein.

Conclusion.

In conclusion, we respectfully submit that the grand jury was without jurisdiction to return the indictment herein; that the indictment as drawn was fatally defective; that the verdict was not supported by any substantial evidence, and that the convictions should be reversed.

Respectfully submitted,

JOHN ELLIOTT BYRNE,
EDWARD J. HESS,
Attorneys for Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, Respondents.

APPENDIX.

Criminal Code:

SEC. 332. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal. (U. S. C., Title 18, Sec. 550.)

SEC. 333. Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years (U. S. C., Title 18, Sec. 551).

Internal Revenue Code:

SEC. 3793. * * *

* * * * *

(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in Preparation or Presentation.*—Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (U. S. C. Supp. V, Title 26, Sec. 3793.)

Judicial Code:

> SEC. 284. * * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than three terms. * * * (U. S. C. Supp. V, Title 28, Sec. 421).

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1703:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Revenue Act of 1938, c. 289, 52 Stat. 447, 513:

Section 145 (b) is identical with Section 145 (b) of the Revenue Act of 1936, *supra*.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 5

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY, STUART SOLOMON BROWN,
Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS, JACK SOMMERS, ET AL., ON REARGUMENT.

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LIST OF AUTHORITIES CITED.

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While rhetoric will not exculpate the respondents from guilt, neither will the piling of an unsupported Pelion on a non-existent Ossa support a conviction of any or either of the respondents. We attribute to inadvertence rather than to misplaced zeal the many misstatements of fact affecting material propositions, found in the Government's brief on reargument. While the important misstatements will hereafter be challenged by the record from time to time, we are intrigued at the outset by the very first statement of purported fact urged by the Government in support of its answer to Question 1 propounded by the Court. On page 7 of the Government's brief is the same footnote

tabulation as appeared in their original brief in this Court, setting out the names of twenty-one so-called clubs and casinos, and immediately thereafter the first sentence of page 8 of the brief recites that "Johnson denied that he owned or had any interest in *those houses*." (Emphasis ours.) From that sentence on, the terms "those houses" and "the houses" and "the gambling houses" are used in the brief to refer to the twenty-one names in the footnote on page 7. Even a cursory examination of the record discloses that there was no evidence even remotely connecting the co-respondents with thirteen of "those houses." We cannot here offer record citations of what the record does *not* say; we respectfully point out this initial inadvertence in the Government's br[illegible], however, as characteristic of the Government's approach to the answer to the first question propounded by this Court.

We state that the record discloses not a single fact pertinent to the issues here nor affecting in anywise these several co-respondents insofar as the following gambling houses are concerned: The Casino Club, The Villa Moderne, The Southland Club, The Western Club, The Select Club, The Mayfair Club, The Northland Club, The Club Proviso, The 4011 Club, 2135 Lake Park Club, The Harlem Club, The 11901 Vincennes Club and The 406 Club.

I.

THERE WAS NO EVIDENCE WHICH WARRANTED THE SUBMISSION BY THE TRIAL COURT TO THE JURY OF THE CHARGES MADE AS TO ANY OF THE RESPONDENTS, SOMMERS, KELLY, HARTIGAN AND BROWN, IN ANY OF THE FOUR SUBSTANTIVE COUNTS OR IN THE CONSPIRACY COUNT.

A.

The evidence as to each of the respondents, Sommers, Kelly, Hartigan and Brown on the substantive counts.

1. There was no substantial evidence that the gambling houses were operated as a unit.

Indiscriminately characterizing each gambling establishment as a part of a supposititious unit of operation and referring to "the houses" as indicating *all* of the gambling houses, by whomsoever owned and operated, and mentioned in the record, the Government seeks to show this Court that there was what they term "a unit operation"; in other words, the theory appears to be that it would be more plausible that one man—Johnson, presumably—owned all of the gambling houses, by showing, or attempting to show, that all of the houses referred to were operated as a unit, than to show Johnson's ownership of gambling houses unconnected by some pattern.

A cogent reason for the Government not answering the Court's first question categorically is demonstrated by the method which they still persist in using to demonstrate their theory of "unitary operation." They search the record for a witness who has served two of the houses, misrepresent a telephone service as being a physical interconnection between five or six of the houses, locate a mover who served two of the houses, find "shills" who worked at

some of the houses, find a bookmaker supply house which delivered to none of the houses, and with other like bits conclude that all of the named gambling houses were one common enterprise. The obvious fallacy in this reasoning is that to make a unit of operation of five component parts, it requires that all five of the parts undertake the identical. For example, if Horse-Shoe and Dev-Lin employ the same "shill" in 1936 but Lincoln Tavern and Harlem Stables did not so employ that "shill" in that year, the unit of operation, if it can be thus dignified by that character of testimony, is a unit, but only as to Horse-Shoe and Dev-Lin. If any one of the component parts does not follow the pattern, the concept of unitary operation is thus destroyed as to it. In other words, when the Government seeks to show that the houses operated as a unit because they had common attributes, the attributes must necessarily be common to all. Furthermore, these common attributes must persevere in this instance year by year and co-respondent by co-respondent, if it is the contention of the Government that all of the houses were operated as a unit for the entire period in question.

This is what the Government's brief discloses as to "unitary operation":

The Government makes much of the fact that certain workmen at different times did construction and repair work at various gambling houses. So one Schmidt said he worked one evening in 1939 in putting in a new floor at the Harlem Stables, four days in 1939 at The Northland Club (connected with no one before this Court), and that he did some construction work in 1938 and 1939 at The Bon-Air (2 R. 336-337). Anderson, a plasterer, said he did some construction or repair work at The Northland Club in 1937, The Bon-Air in 1938, and the Lincoln Tavern in 1939. He also stated that he did some construction work at the Horse-Shoe, D. & D., Harlem Stables and 4620 Ogden Avenue, but did not state when he did such work

(2 R. 129-131). McGinnis, a construction laborer, said that in 1938 he did construction work at The Bon-Air and repair work at The Northland Club (2 R. 134-135). That Schultz worked at Dev-Lin and The House of Niles in 1935, is not relevant or compelling on the question of unitary operation or unitary ownership in 1939. Certainly, the fact that these men, engaged in construction work, did work at different houses, at different times does not prove unitary operation or ownership in one individual of *all* of the houses during the period here in question. However, even if it be assumed that the very same crew of men employed by the same construction contractor, did construction and repair work at all of the houses during all of the years in question—which clearly is not the evidence in this record—would this fact be any more proof that all of the houses during all of the time were owned by one individual and operated as a unit, than would the fact that certain house-owners in a given neighborhood employed the same carpenter or contractor over a period of time, prove that all of such homes were owned by one individual or operated as a unit?

The fact that most of the gambling houses used one service bureau for their race information is deemed proof by the Government that the houses were operated as a unit. First, it is to be emphasized that many gambling houses not in any way connected with the instant co-respondents were served with horse racing information by this same service bureau (3 R. 935).

The Government relies on the testimony of one witness who worked at the K. & K. Club (in no way connected with any of the instant respondents), in 1929 and 1930, who said he procured supplies and equipment for this club by ordering them over the purported telephone system, and the testimony of the owner of a bookmaker's supply house that he delivered such supplies to one John Morgan at the store and office building where the service bureau occupied the

second floor (3 R. 729-732) or one that was in the building next to it (3 R. 731). There was *no* evidence that these supplies were delivered to or purchased by the "service bureau," or that the "service bureau" in turn sold or delivered such supplies to any of the gambling houses. This same owner of the bookmaker's supply house testified that he sold gambling supplies and equipment to Flanagan, Sommers, Hartigan, Kelly, Creighton, Mackay and Meade (3 R. 732-733). He further testified that he sold Sommers "at his place of business called the Dev-Lin" and at the Horse-Shoe, and that he delivered the goods to Sommers personally, and that Sommers paid for them (3 R. 732). Likewise, he stated that he sold such merchandise to Creighton; he called at the various houses operated by Creighton, delivered the merchandise at such houses and was paid by Creighton (3 R. 732). Again in the case of Hartigan, he called on him at the Harlem Stables and Lincoln Tavern and delivered the goods at these places and was paid for them by Hartigan (3 R. 733).

We do not challenge the propriety of the Government's brief draughtsman in seeking to draw any reasonable inference whatsoever from any bit of testimony. We do, however, again protest the innuendo that a single supply house sold to a "clearing house" which in turn serviced these co-respondents—to build up the unitary operation notion—when the record is crystal clear that the several co-respondents purchased those supplies severally and directly for their own houses, from the supply house.

It is to be emphasized that the statement at page 15 of the Government's brief that "the gambling houses were interconnected by a private telephone system" is not supported by the record. The record indicates that each gambling house which subscribed for the horse racing news service was furnished with a one way broadcast line over which the racing news was broadcast from the service bureau to the room where the bets were placed, and with a two

way line from the service bureau to the house and over which there was two way communication between the bureau and the house (2 R. 214, 932). However, there is no evidence which even intimates that one house could communicate with another through the switchboard at the service bureau. There was a regular switchboard connection for each house with the telephone company (3 R. 697, 704). Upon analysis it is clear that the telephone communications between the gambling houses were no more "private" than that between any other two telephones in the Bell Telephone System.

Obviously, the fact that the gambling houses subscribed to the same service is no more proof that they were operated as a unit, or that they are all owned by one individual, than would the fact that separate and individually owned business enterprises subscribe to the same electric light, gas and telephone service furnished by the same companies be proof that these businesses were all operated as a unit or owned by one individual.

The Government seizes upon the fact that on occasion, usually when the respondents' own houses were closed, they were seen at other houses, to show unitary operation and ownership in one individual (Brief, pp. 18-22).

At page 19, the Government urges that one witness stated the conclusion that Sommers was night boss in 1937 and another stated that he was day boss in 1939 at the Horse-Shoe. Is this intended to disprove that Sommers was boss? Again the fact that one employee described Sommers as working as a cashier is argued. Indeed, a gambling house proprietor, described by another witness as doing a little of everything, might act as a cashier. A proprietor of any establishment might take particular delight in that function.

Because on some occasions (almost always when his own houses were closed and not in operation) Sommers

was at Harlem Stables and the Lincoln Tavern, from which a few persons concluded that he "seems to be some one of the bosses" (2 R. 346), that is taken as evidence that Sommers was not the owner of Horse-Shoe or of Dev-Lin, and that all of the houses were operated as a unit. Further, in the winter of 1936, and again in the summer of 1937, when the Horse-Shoe and Dev-Lin were closed and Hartigan was not using his facilities at the Lincoln Tavern, Sommers moved his equipment and crew to the Lincoln Tavern, and operated there, under arrangements made with Hartigan (3 R. 787, 812-813, 848). This fully explains the presence of Sommers and some of his employees at the Lincoln Tavern.

Reliance is next placed upon Adelaide Rebman, the woman "red and black" player. The Government's brief (pp. 19-20) states that she testified that she saw Sommers acting in a "supervisory capacity" at the Dev-Lin, the Lincoln Tavern, the Harlem Stables and the Horse-Shoe. (He acted in a supervisory capacity of course, in his own places.) But what witness Rebman did in part say was that over a period of four or five years she saw Sommers at the different houses and that "On the occasions I saw him at these different places he would go to the different tables and watch, and walk around and if anybody had anything to say they went up to him and talked to him. I have had occasion to hear other persons talk to the defendant Sommers lots of times. I do recall conversations I heard between Sommers and other persons. I cannot state the approximate time at which any of these conversations took place. My best recollection is that it was when I was playing but I couldn't say just when it was. I was playing there within the last five or six years" (3R. 567). So if this absolute zero in evidence of either unitary operation, or ownership, be accepted as a fact having probative value, does it even tend to prove or demonstrate that it attaches to any single year or any single count?

The same type of isolated and irrelevant incidents with respect to Hartigan are seized upon by the Government in an effort to give an appearance of substantial evidence to support the convictions of all of these co-respondents. Many of these incidents actually support the testimony of the latter.

It is urged that two witnesses testified that Hartigan was a night boss at the Lincoln Tavern in 1936 and the night boss at the Harlem Stables in 1938 (Brief, p. 30). Manifestly, as proprietor and owner of these two gambling houses, he was boss. Likewise, the testimony of the "red and black" woman player that she saw Hartigan (the time is not stated) at the Lincoln Tavern and Harlem Stables (his houses) and at the Horse-Shoe and Dev-Lin and that he walked around and acted "like a floor-walker" is urged as proof that Hartigan *did not* own the Lincoln Tavern and the Harlem Stables, and that all of the houses were operated as a unit.

The fact that Hartigan was stated to have been a "box man" at the 4020 Ogden Club in 1931 and 1932 and one of its managers during the period 1933-1935 is urged by the Government (Brief p. 21) as proof that Hartigan was not the owner of the Harlem Stables and Lincoln Tavern from 1936 to 1939, and that during 1936 through 1939 all of the houses were operated as a unit.

Likewise, alleged acts at the Horse-Shoe during 1934 and 1935, from which some witness concluded Hartigan was a boss, is deemed proof by the Government that he did not own the Lincoln Tavern and Harlem Stables during the period from 1936 to 1939.

The Government concedes that its case against Flanagan here is weak (Brief, pp. 21-22): but it hangs tenaciously to two very small crumbs, and on these it seeks to sustain criminal convictions against all of the respondents: The only evidence with respect to Flanagan here is the state-

ment of Cobb, the shill, that "I saw him (Flanagan) at Tessville (Dev-Lin) the first couple of times acting as a visitor and then taking part charge if some of the bosses were not there" (2R. 352), and the statement of one witness that Flanagan was sitting at the entrance of the Lincoln Tavern one evening and "shook hands with people that he knew evidently" (2R. 296). Flanagan was convicted by the jury. If he were alive, the Government would insist that the case against him was "compelling" and "clear." Creighton, owner of a string of gambling houses, Mackay of two others, Wait of another—were acquitted. They should have been.

Equally weak is the case against Kelly on this contention. Kelly rented the space for the D. & D. Club in September of 1936 and later that year opened the club (2R. 14). The fact that two witnesses stated they saw Kelly as a box man at the Lincoln Tavern, one of which did not state when (2R. 237) and the other perhaps sometime in 1936 (2R. 296), and the fact that one witness testified in 1940 that Kelly was box man at the Horse-Shoe "four or five years" ago, are deemed proof by the Government that Kelly did not own the D. & D. Club from its opening, late in 1936 until 1939, and that all of the houses were operated as a unit. One witness said that when he worked at Dev-Lin (the time was not fixed) "William or Pete Kelly had charge of the wheels" (2R. 333-334)—and he did not identify the defendant Kelly. Yet the Government relies on this testimony (Brief, p. 22).

The Government at page 22 of its brief states that five witnesses stated "or indicated" that Kelly was boss at the Harlem Stables. Of the five, Government witness Hayes stated that he worked at the Harlem Stables when the D. & D. had been closed, and that when the D. & D. was so closed he "considered" Bill Kelly *his* boss while at the Harlem Stables (2 R. 297). The D. & D. Club was closed from August 31, 1937, until February, 1938 and again from

August 31, 1938 until December 1, 1938 (Defendants' Exhibit K). This Government's witness certainly supports the simple fact that the co-respondents, on isolated occasions, over a long period of time, visited and assisted other gambling house owners whose houses were open. Again Government witness Harvan testified that in July, 1939, he saw Kelly as "a boss" at Harlem Stables. The record shows that the D. & D. Club (Kelly's) was closed from June, 1939 until October, 1939! (Defendants' Exhibit K).

Government witness Luria, upon whose testimony the Government relies to show that Kelly was a boss at several houses (Brief, p. 22) made clear whom a shill considers a "boss" and explains fully the "boss" testimony upon which the Government so heavily relies. Luria, a shill, said "Mr. Kelly was boss at Harlem Stables. There was lots of straw bosses around there. Everybody is a shill's boss. A shill takes orders from every one—anything that is needed, a shill, anyone tells him what to do and he does it. That is the way I characterize Mr. Kelly, as a boss out at the Harlem Stables—because he bosses me as a shill" (2 R. 325).

The fact that some regular gambling house employees, over a period of several years, were employed at different gambling houses is next seized upon as indicative of unitary operation and ownership in one individual. However, the Government recognizes that "a considerable portion of this shifting was attributed to the individual acts of the employees or to the fact that the houses were not operated all at the same time but at various times, and the employees would shift to the house or houses which were open" (Brief, p. 22). Certainly this movement of employees from houses where there was no work to houses where there was work does not prove ownership in one individual or unitary operation any more than the fact that workers (individually or en masse), are constantly shifting from those plants where there is no work to those

plants where there is work, proves that all such plants are owned by one person or operated as a unit.

Another hiatus between evidence and assumption is apparent in the Government's case against Sommers. In a period covering several years, the Government seeks to show that less than a half dozen employees were either sent or recommended for employment by Sommers (*or his employees*) to other gambling houses, some of which were in no way connected with any of the defendants (Brief, p. 23). Illustrative of the manner in which the Government interprets the record is revealed by the case of the "shill" at the Horse-Shoe who was "told", says the Government, to go to Harlem Stables (Brief, p. 23). What really happened is disclosed by the testimony of the "shill": "One of the boys, a runner on the floor said, 'You go to the Harlem Club. They want some men out there tomorrow'. He said, 'I got too many men here' * * *. They told me to go over there and look for a job" (2 R. 255-256).

Likewise as to Hartigan, all that the Government could find, in a period covering several years, was the fact that two persons were sent by Hartigan to obtain jobs. As to Flanagan, the Government is forced to go back to 1933 to find one instance where Flanagan sent a "shill" working at the 4020 Ogden Club to the Horse-Shoe (when it was operated by Barnes) for work (2 R. 295). Again, as to Kelly, all that the Government could muster was less than six instances of individuals either sent or recommended for jobs by Kelly during a period of several years (Brief, p. 24). It is evidence such as this which is urged by the Government to support its contention that the respondents did not own the houses which they swore they owned, and to support its contention of unitary operation and ownership of all houses by Johnson.

Rightfully relegated to the "miscellaneous" category are the so-called factors allegedly tending to show unitary ownership and operation, set forth at pages 24 to 30 of the Government's brief. The fact that Sommers, Kelly and Hartigan used the same mover on occasion is grasped by the Government. Yet the Government noted that the mover received separate orders for moving from each of these defendants, and that Sommers, Kelly and Hartigan each paid him separately for the separate services rendered to each of them (Brief, p. 25). Under the Government's theory, all householders using the same moving company during a period of years have a unitary operation and their furniture is thus owned by one individual.

Of the same calibre is the testimony showing that in different years at different times, different equipment was moved from some of the houses to others, including the House of Niles, which is in no way identified with the instant co-respondents (Brief, p. 25). The record establishes that Sommers operated the Lincoln Tavern for short periods in 1936 and 1937 with Hartigan's consent, when the Horse-Shoe and Dev-Lin were closed, and when Hartigan was not operating the Lincoln Tavern (3 R. 787, 812-813, 843). This accounts fully for the movement of equipment between the Horse-Shoe and the Dev-Lin and the Lincoln Tavern.

Hartigan operated both the Lincoln Tavern and the Harlem Stables. As the owner of both, there is no "unitary operation" inference whatsoever in the fact that equipment was shifted between these two houses owned by him. Yes—he may have operated his own houses as a unit. What did that have to do with Sommers, with Kelly, with Flanagan, or with Johnson? However, even if the record did not demonstrate these real reasons for the movement of equipment, certainly the fact that over a period of years the same or different gambling equipment was moved from one house to another is no

more compelling proof of unitary ownership or operation than the fact that soda fountain or other equipment moved in a period of several years between several restaurants proves unitary operation and ownership of those restaurants.

The fact that patrons were brought from some of the city houses to the Lincoln Tavern during a part of 1936, and to the Harlem Stables during a part of 1937 and in 1939 is relied upon by the Government to show unitary ownership and operation.* It is to be observed that during the said periods the city houses were closed and the Lincoln Tavern and Harlem Stables, both in the country, were open. By the same token, merchants, who do not have a given item in stock and who send customers to a neighboring merchant who has the item, should be deemed to be operating as a unit and their business owned by one individual.

The lengths to which the Government was forced to go in its attempt to create some semblance of evidence is made clear by the recurrence to the school which was conducted for "dealers" (Brief, p. 27). This school was not limited to shills from the houses owned by these co-respondents. On the contrary, the record indicates that shills from houses in no way identified or connected with these co-respondents attended that school (2 R. 385). Moreover, nothing in the record discloses how long the school was in operation.

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* Indicative of the manner in which the record is strained by the Government, is the statement that *eight* witnesses told of the carrying of customers from the D. & D. Club, The Horse-Shoe, and 4020 Ogden to Harlem Stables (Brief, p. 27). An examination of the record discloses that of the eight witnesses cited, only *four* even tend to bear out this statement of the Government. Witnesses Cusak (2 R. 249-250), Cargett (2 R. 254), Harvey (2 R. 262), Kudesh (2 R. 381-382), cited by the Government, do not support this statement of the Government.

We thus have seen, from item to item, another reason why the Government is adverse to answering the Court's question: That question required *time* data as to each respondent for each count. The sketchy "case" presented by the record falls down too often on the time factor to make it advisable, from the Government's point of view, to answer Question I. categorically.

On the same plane, is the last of the miscellaneous factors upon which the Government relies, namely, the fact that some of the houses at different times used the facilities of the same currency exchanges. Again, this bubble is pricked by the fact that neither Flanagan nor his 4020 Ogden Club ever obtained any currency exchange services at any currency exchange doing business with any of the other gambling houses (3 R. 552-559) and by the further fact that Mackay and Wait obtained their currency exchange and banking services at banks and exchanges different from those employed by the other defendants (2 R. 515, 519; 3 R. 911).

It is to be noted further that the repeated assertion of the Government that the currency exchange transactions of the Horse-Shoe, Lincoln Tavern, D. & D. Club and Harlem Stables were handled through a single account is not the fact (Brief, pp. 27, 29, 50, 58). There was no single account and there were no deposits made in any such purported account. Each check cashing transaction was distinct and separate. In the event a given check was not paid, then the person cashing such check was required to make good. The exchange kept a list of the checks cashed and of the last endorser, so that it knew who cashed the check and could proceed against such person in the event a check was bad. Further, the statement appearing on page 28 of the Government's brief to the effect that checks cashed at the Albany Park Currency Exchange from the different houses were initialed to indicate their source

and that separate envelopes were used for the cash due each house for the checks from it, clearly points to a separate, not unitary, handling of the checks for each of the houses.

How the fact that one Government witness did not recall seeing Hartigan at the Lawrence Avenue Exchange and that another did recall seeing Hartigan eight or ten times, but never saw Kelly there, and the fact that Brown's partner in the exchange brought checks in every morning (Brief, p. 29) proves that Sommers did not own the Horse-Shoe and Dev-Lin, that Kelly did not own the D. & D., that Hartigan did not own the Harlem Stables and Lincoln Tavern, but that all of these were owned and operated as a unit, is difficult to follow, even under the Government's practice of placing inference upon inference. Indeed, the fact that some of the operators at different times employed the services of the same currency exchanges is no more proof of unitary operation and ownership than the fact that several independent business enterprises, who do their banking at one bank, are owned and operated as a unit.

When this Court threw the searchlight on the record by requiring the Government to answer Question I, we expected that the Government's answer would be a count by count analysis as to respondent by respondent, and, parenthetically, if there was any substance to the conspiracy count, that the Government might suggest why if the substantive counts fell one by one there was any reason why the conspiracy count might yet stand. But since the record will not stand the searchlight, count by count, respondent by respondent, even the first step in the Government's theory—that all of the gambling houses mentioned in the record (or even those actually pertinent to the issues) were operated as a unit, cannot stand exposition.

2. There was no substantial evidence that respondents, Sommers, Hartigan and Kelly were not the actual owners of the respective gambling houses claimed and operated by each; there is no substantial evidence that Johnson was the owner of those gambling houses.

The co-respondents, Sommers, Kelly and Hartigan, are presumed under the Government's theory, to be the operators or managers for Johnson. Waiving aside for the moment the pricking of this bubble by the definite implication contained in the acquittal of Creighton, Mackay and Wait,* we must examine first the interests of the instant co-respondents. To arrive at the facts it is important that we consider the Government's theory insofar as ownership of "the houses" alleged to have been operated as a unit under the management of the co-respondents, is concerned. The Government employed the unique device of introducing statements made by the co-respondents under oath to Federal investigators and before the Grand Juries relative to the ownership of certain specified gambling houses (2 R. 462-467). Each of the co-respondents, including those who were acquitted made positive statements under oath asserting that the affiant, or witness, as the case may be, was the sole owner of one or more gambling establishments. Thus Sommers testified that he owned the Horse-Shoe and Dev-Lin (3 R. 809-812), Hartigan that he owned the Harlem Stables and Lincoln Tavern (Government brief, p. 18), Kelly that he owned the D. & D. Club (3 R. 878).

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* These last named men were co-defendants, each charged in the substantive and conspiracy counts with Sommers, Hartigan and Kelly. The same type of evidence employed to convict the latter men went to the jury as to Creighton, Mackey and Wait. They were acquitted. We mention this, not as justification for acquittal of the co-respondents, but to demonstrate that a jury, in this case, on this evidence, did acquit three men charged with the same offenses as are Sommers, Hartigan and Kelly.

Instead of the usual rule prevailing, that this evidence introduced by the Government bound the Government on the question of ownership, evidence was introduced to support the Government's theory that when the co-respondents made these statements of individual ownership they were lying and thus concealing the true ownership, presumably in Johnson, and thus aiding and abetting Johnson in concealing his taxable income (if any taxable income actually flowed to Johnson from this theoretical operation). This was in part the alleged scheme whereby the co-respondents are said to have conspired to aid and abet Johnson in the evasion of his income taxes.

Recur for a moment to the background: At the very time when these statements were made by the co-respondents, a Federal Grand Jury in Cook County, Illinois, was investigating them relative to this subject matter. They were so advised by Riley Campbell, Assistant United States District Attorney (3 R. 863). They were (inversely) invited, by threats of Campbell, to lay the ownership of the gambling houses which they owned to Johnson (3 R. 863-864, also 3 R. 821).

Had they done so they would not have been before this Court. Had they testified as the Government wished them to do, namely, to lay the ownership of these gambling houses upon Johnson, they would have been invulnerable to this or collateral prosecution. They well knew, at the very hour the statements of their ownership were made, that the simplest way for them to become defendants in a Federal prosecution, to become defendants in this proceeding, and furthermore, to be indicted in respect to their own individual tax returns, as they were, was to affirm and maintain their ownership as individuals, alone and apart from any interest of Johnson, or any other person in the gambling establishments of each of them.

This background is important because it bears directly on the question as to whether there was substantial evidence to go to the jury as to these co-respondents, not only on the substantive counts but also on the conspiracy count. If there is credible, substantial evidence in this record, on a material fact, and hazy conjecture opposing it, this Court should know—not only *what* went to the jury—but the quality and character of that testimony. While this tribunal will not *weigh* evidence, neither will it suffer the incredible to prevail over the truth. Thus the credibility of the statements of the co-respondents as to the ownership of their respective houses, merits scrutiny.

Having introduced the statements above referred to, setting forth the individual ownership of the houses by the several co-respondents, the Government then proceeded to introduce a plethora of evidence designed to throw suspicion on the individual ownership of the co-respondents.

To show ownership in Johnson, for example, the Government conceives that the procuring of jobs for others by a person indicates that that person is the owner of the place wherein the job was procured. Complementing this, the Government conceives the notion that the word "boss" is indicative of more than casual interest, but designates ownership. Under the sauce for the goose theory, let us examine analogous situations in reference to the co-respondents. Government witness Bingen (2 Rec. 254-255) said that Hartigan employed him at Lincoln Tavern, that Jack Sommers employed him at the Horseshoe, and that Kelly employed him at the D. & D. Government witness Ehrlich (2 Rec. 246) testified "Mr. Hartigan was in charge at the Lincoln Tavern. I don't recall any one else." Government witness Brenner (2 Rec. 284) testified "I worked at the Lincoln Tavern until it closed. Jim Hartigan was my boss all that time." This witness

also testified (2 Rec. 384) "My boss at Harlem Stables was Jim Hartigan—no one else," and again (2 Rec. 386) "When I worked at the D. & D., Mr. Kelly was proprietor —no other man was in charge except Mr. Kelly." Government witness Greenwald (2 Rec. 391) testified that Sommers was his boss at Dev-Lin and that Hartigan was his boss at Lincoln Tavern and (2 Rec. 392) "Kelly was my boss at the D. & D." Government witness H. Meyer (2 Rec. 328) testified that Sommers was his boss. Government witness T. Fahy (2 Rec. 317) testified "Mr. Sommers was my boss at Dev-Lin."*

We do not assert the proposition that a porter or a "shill" is competent to qualify as an expert on proprietorship, but if this is the character of evidence indirectly employed to impeach the verity of the statements made by the co-respondents on ownership, then the Government has by that method proved ownership of the gambling houses in question to be in the co-respondents.

Moreover, Government witness Tavalin, agent for the premises where the D. & D. Club was located, testified that he rented the premises to the defendant Kelly (2 R. 16), who operated the D. & D. Club (2 R. 458; 3 R. 878). The renting was handled through Tavalin in exactly the same manner with respect to Kelly as with respect to other tenants in the building (2 R. 14, 23). All of the income received as rent was reported by Johnson in his income tax returns (Government Exhibits R 10, R 11, R 12, R 13, 3 R 950). This is proof, not mere speculation, that Johnson did not own the D. & D. Club.**

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*With all of the resources at its command, the Government failed to furnish like testimony as to Johnson being any one's boss.

** The Government did not call the rental agents for the property where the Harlem Stables, operated by Hartigan, was located, nor the rental agents for the respective prop-

No, the inherent weakness of the Government's case appears by viewing it as this Court directed it be viewed. Not by delivering pontifications of guilt, not by the use of italics, not by the employment of round phrases. But by setting up the evidence relied upon for conviction of these co-respondents.

This the Government's brief has failed to do.

3. The evidence as to each of the respondents, Sommers, Hartigan and Kelly as to each of the substantive counts.

The Government has strongly indicated in the opening pages of its brief that it is not in sympathy with the questions propounded by the Court. The questions preclude the device of lumping disconnected, oft times irrelevant, and at no time direct, evidence to any co-respondents in any given year.

We believe that the succinct phrasing of this Court's first question was predicated upon the Court's desire to

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erties on which the Dev-Lin and Horse-Shoe clubs, operated by Sommers, were located. The agent for the Harlem Stables property, Walter Sass, was called by Hartigan. He testified that Hartigan rented the property from him in August, 1936, and that Hartigan had paid the rent regularly since that date (3 R. 804-805). The agent for the Horse-Shoe property, Florence Chalmers, called by Sommers, testified that Sommers rented the Horse-Shoe premises in December, 1934 and that he had regularly paid the rent since that date (3 R. 782-783; Defendants' Ex. S-1-a to S-1-f and S-2-a to S-2-f). The owner of the Dev-Lin property, John Engsler, called by Sommers, testified that Sommers took over the operation of the Dev-Lin property from Wait in May, 1936 and that Sommers had paid the rent for the said property since that time (3 R. 784; Defendants' Ex. S-4-a to S-4-f). These witnesses were disinterested in the outcome of this cause and their testimony was unimpeached.

have the Government unravel its web, to determine if any skein or thread inculpated any defendant.

"What evidence" asked the Court "warranted submission by the trial Court to the jury of the charges made as to each of the defendants (a) in each of the four substantive counts, and (b) in the conspiracy count?"

"Charges made as to *each* of the defendants" in each count.

Not to lump a mass of matter and assume it to apply to all—but to spell out its case against *each* defendant, year by year.

This—again—the Government has failed to do in its "Evidence as to the respondents Sommers, Hartigan, Kelly and Brown on the substantive counts",* (Government's brief, pp. 67-75). The evidence, lumped as to all of the co-respondents, is sketchy enough—but when the Court's injunction is followed, the "case" against these co-respondents collapses.

We assume that the Government culled from its 145 witnesses and the large record, every syllable it could reasonably argue was evidence against the co-respondents. Therefore, we shall follow the Government's brief, pp. 67-75, to delineate the evidence as to each of the defendants, year by year (*i. e.*, count by count).

(a) SOMMERS.

1936—no evidence.

1937—A customer asked for a loan and Sommers said he'd have to talk to the big boss. When asked who

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* Since the Government links its "unity of operation and ownership" theories to these co-respondents, we respectfully refer to our brief, pp. 3-20, on this phase of our breakdown of the Government's case.

this was, Sommers is said to have answered Johnson.

Comment: This witness was impeached by another Government witness, and by himself on cross examination. He related how Sommers dialed the telephone to talk to the big boss. Government witness Moore (3 R. 704), proved that there was no dial telephone at the address and at the time in question. Again, he testified that he gambled wherever he thought there were Johnson houses and would not gamble in any other, and he then proceeds to name other gambling houses never identified with Johnson by any one. That's the "case" against Sommers for the year 1937!

1938—1. Sommers, called to a table over an argument, said that if there were complaints to make them to Johnson.

Comment: It would be topical if Sommers had said "Tell it to the Marines." There might have been some point to the story if, following Sommers' alleged statement, one of the complaining parties went to Johnson, who then, as a proprietor but not as an intermediary or a friend, adjusted the difficulty or complaint, but this instance, like the Rebman statement on the limit of play at a gambling house,* was entirely unconnected with any act by Johnson in derogation of Sommers' ownership of the gambling house.

2. Sommers gave the excuse to the Albany Park Exchange for taking his business away, that

* The witness Rebman testified that she wanted the limit on "Red and Black", which had been reduced, restored. She said she was advised to see Johnson; that she did so and that Johnson said he would see to it. The limit was not restored (3 R. 573).

Brown, the recipient of the business, was in "their" building. (No one identifies "their").

Comment: Insignificant as is this alleged evidence, it is pertinent that no one identified who or what was meant by "their". Perhaps the Government is now seeking to prove that Sommers had an interest in the fee of the Albany Park Bank Building.

3. A customer complained of the limit on a game at the Horse-Shoe, and was told to see Johnson. She said she saw Johnson, who said he'd see Sommers and have the limit changed immediately; it was not changed.

Comment: This is the instance just referred to in a footnote on restoring the limit. Had the limit been changed by the direction of Johnson, there might have been a plausible excuse for the Government's dependence on this testimony, albeit a far cry from ownership. This instance, however, like the instance of calling the big boss about a loan, was at best an illustration of buck passing. Many a man when importuned for a loan or for a decision he did not wish to make will evade by claiming he'll have to talk to Mr. So-and-So about the matter.

4. Sommers was present when Johnson told Brantman not to put his, Johnson's, name in Sommers' income tax return.

Comment: What the record (2 R. 443) really shows is that the witness stated that Johnson said "I am not the employer of these men * * * don't put my name on there as the employer." If that testimony has value, it must be the affirmative value of corroborating the co-respondents.

1939--Sommers discharged the witness Cobb for stealing quarters at the Horse-Shoe (Cobb's testimony, 2 R. 356) and Cobb, at the trial, testified that when so discharged, Sommers told him that "the only one who can take care of you now is the big boy". And gently led on from there, Cobb testified that he knew who the big boy was. It was Mr. William Johnson, said he.

Comment: *That* is the 1939 evidence upon which the Government relies to sustain its conviction of Sommers. *That* demonstrates ownership of the Horse-Shoe and Dev-Lin to be in Johnson in 1939, infers the Government.

(b) Hartigan.

1. (Though no time is set for the first illuminating bit of "evidence" against Hartigan, it so thoroughly confirms this co-defendant's insistence on ownership that it bears repeating in this brief):

A "shill"--Cobb (whose entire testimony is worth reading if only for comedy relief)--stated that Hartigan threatened to discharge a crew of "shills", of which the witness was one, for theft. Hartigan didn't threaten to call Johnson--Hartigan threatened to "fire the crew". Customarily, that is one of important criteria of ownership,—the right to hire and fire. The right to hire is set up by the Government as strong indication of Johnson's ownership; the right to fire must have some weight, even when inconsistent with the Government's theory.

2. (No year is set for the next link in the chain against Hartigan, but it seems important to the Government's theory; we believe it confirms the co-respondent):

Hartigan, when berating the crew for the unaccounted disappearance of money, told them not to say they were working for Mr. Bill Johnson. That is taken by the Government as evidence that they were in fact working for Johnson.

3. In 1934, Hartigan, relating a gambling incident, said "That was before I worked for Bill" and that since Johnson was called Bill so often, he assumed it was Johnson. The Court said (2 R. 302) that this testimony could stand for what it was worth.

Comment: Indulging in another Governmental assumption, that Johnson was the only man in Chicago called Bill, this conversation in 1934 might fill space in the Government's brief, but is scarcely evidence that Hartigan was not the owner of the Harlem Stables and Lincoln Tavern in 1936-39, both inclusive.

1939—1. Witness Lang (Government brief, p. 70, 2 R. 319-21) is alleged to have been hired by Hartigan in response to letters to Johnson.

Comment: Lang did testify that he wrote to Wm. R. Johnson for employment; that he later received a telephone call from an undisclosed source, to report to a man he later identified as Hartigan. He did not see Johnson after (or, presumably, before) writing the letters.*

* The record discloses (1 R. 77-79) that there were hundreds, perhaps thousands, of employees of the gambling houses from time to time during the years 1936-1939. If it be true that Johnson was instrumental in obtaining employment for four or five men during this period, can it be evidence even remotely tending to prove ownership in Johnson of the establishments where the men got work? Important customers, clients, patients have a great bit of influence in this respect. And that Johnson was an

2. A note signed Bill presented by another witness to Hartigan, resulted in employment.

Comment: It was given to the witness by his friend, *William* Rosenthal, who wasn't nicknamed "Jack" or "Joe" so far as the record goes. In fact, the record indicates he might have been called "Bill" (2 R. 348).

(c) KELLY

There is no evidence in any year, on any count, tending to show anything. The most that the Government was able to glean from the record, in answer to the Court's definitive first question, is the following:

In *1935*, Kelly's 1934 tax return was being investigated. Brantman, the accountant, appeared at the Collector's office for Kelly, says Updike, the witness relied upon by the Government to bring the names of Kelly and Johnson into the same sentence. Brantman told an auditor for the collector that he did accounting for the employer of Kelly. Who was this employer? The record and the Government's brief are silent on this point. But the Government has shown that Brantman did work for Johnson, hence,—

That is the Government's case against Kelly on the substantive counts.

The years 1936, 1937, 1938, 1939:

Well, says the Government, we have shown unitary operation of gambling houses, a vast

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asset to any gambling establishment as a drawing card, goes without question. If sending notes or making calls to industries or businesses, requesting that Blank be put to work, is substantial evidence of ownership in the man requesting that another be employed, then indeed title records and stock certificates are tenuous and precarious indicia of ownership.

amount of dollars gambled, a theory that currency exchanged and checks exchanged for currency equals income—"and the guilt of the respondents Sommers, Hartigan and Kelly in aiding and abetting the attempted evasion becomes clear."

On page 70 of its brief, the Government substitutes innuendo, argument and inference for the evidence required by the Court's question! It sums up the flimsy tissue hereinabove detailed and concludes: "Each of the respondents, during all of the years covered by the indictment participated in the operation of the gambling houses in question in a manner to conceal Johnson's financial interest in the houses and the amount of the incomes of the houses." Again, by stating the ultimate legal conclusion, the Government waives aside and away the modicum of required evidence.

* * *

But there was one further attempt made, in the Government's brief, to reflect a case against the co-respondents. It recites and again attempts to refute, the statements of ownership, made by the several co-respondents to revenue agents, in 1939.

We have heretofore (pp. 17-19) discussed this ingenious device of employing the statements of these co-respondents as a basis—not for their verity—but for attacking them collaterally by "shills'" and porters' testimony in derogation of the facts set out in the statements—*i. e.*—ownership of certain designated gambling houses. We have discussed the background against which these statements were made—indictment and prosecution if the co-respondents insisted on the fact of their own several ownerships; release from the slightest imputation of wrong if only

the co-respondents would place ownership in Johnson. Under indictment, on trial here, the co-respondents persevered in their insistence that they and each of them owned the gambling houses originally claimed by them as their's alone. And, as earlier set forth in this brief, we believe the Government's own record and witnesses corroborate the ownership statements of the co-respondents. "Boss," as to Johnson means "owner," says the Government. "Boss" as to each of the co-respondents means "employee of Johnson," says the Government—when Government witness after Government witness tells how he was hired, worked for and fired by the co-respondents.

* * *

Not a farthing of gambling house income has been shown to have trickled from the co-respondents into Johnson's hands. Not even a Goldstein was brazen enough to say "Why yes—I took $10,000 from the tables at the D. & D. and bought a building for Johnson—and Kelly stood right there and smiled." Not even a Goldstein was venal enough to say "Hartigan took $5,000 from his pocket and told me to give it to Johnson, and not to forget to tell Johnson—Wm. R. Johnson, please—that it represents his interest in this week's play at Lincoln Tavern." Not a syllable in the huge record even tended to link these co-respondents with the respondent Johnson in any relationship dealing with, or even fringing upon, the offenses charged.

Certainly these co-respondents had many common interests; certainly these co-respondents were even and always in variance with the State and local laws affecting gambling. Certainly it was greatly to their mutual advantage to associate, one with the other, at any one or more of the gambling houses, when any other particular house or houses were closed down. That Sommers, when the Horse-

Shoe was closed, would be found at any other gambling house, in any capacity whatsoever, is neither sinister nor remarkable. Even in legitimate enterprises, business men work with and for each other under a great variety of occasions.

That such infrequent happenstances can be used by the Government to assume or speculate upon the so-called "unitary operation" is demonstrative of the inherent weakness of the Government's case against the co-respondents. The coincidence of employment of the same carpenters by several gamblers, of the joint use of bus or telephone service by three others, does not strengthen that weak case. Surely the employment of the same accountant, or cook, or lawyer can be no better indication of unitary operation. There once was a day when competitors were often deadly enemies, but for many years the trend has been the reverse. It has become good business to fraternize with a competitor, to use the same services, to exchange ideas, to adopt identical programs and policies. Take any industry, whether it be retail coal merchants, wholesale scrap metal men, or building material producers. If one finds an efficient accountant or lawyer or trade paper or carpenter-contractor, the industry—or, to analogize here, several firms from within the industry—will employ or use that man or service. That such employment would be grounds for predicating an anti-trust case against the few who used the common service, falls by stating it.

This is all of the evidence in the record, upon which the Government relies, to connect these respondents with the suspicion that they were not the true owners. The Government offered, in its case in chief, in corroboration of these co-respondents, evidence of a far higher character than that which they introduced to point ownership as being in Johnson.

4. The evidence on the substantive counts as to the respondent Brown.

It is not enough to say that if there was enough evidence to go to the jury as to the respondent Brown, then every banker, bank teller and cashier who testified for the Government that they too handled the gamblers' checks should have been indicted and connected with Johnson, as co-defendants. Let us instead analyze what the Government conceives to be its case against this respondent.

Brown had been a teller in the Ogden National Bank in Chicago and had known Hartigan (3 R. 615, 616). In testimony given by Brown to the Grand Jury in January, 1940, and introduced in evidence in the trial court (3 R. 620), it was disclosed that Brown approached Hartigan with the idea that Brown thought the operation of a currency exchange would be profitable, and that Hartigan could direct to the currency exchange profitable business.*

The record discloses that each advanced approximately $2,000.00 to start the venture (3 R. 623). Hartigan protected his $2,000.00 by putting his niece in the Lawrence Avenue Currency Exchange, as it was called, and she was reflected as a partner on the books, but was in fact an employee (3 R. 623). It is undisputed that the gambling

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* The evidence disclosed that at this time the witness also knew Johnson (3 R. 618). If Johnson were the owner of the gambling houses and if Brown wanted to be part of a cog in Johnson's alleged gambling house machinery, it is far more likely that he would have sought out Johnson, rather than Hartigan. A porter or a yard man or a "shill" might confuse a manager with a proprietor, but a former bank official such as was Brown would not do so—if the Government's theory that Brown had knowledge of the alleged scheme, is followed. But he did not see nor talk to Johnson!

checks exchanged represented approximately 60% of the business of the currency exchange, and that 40% was business which Brown was able to attract to the exchange from other sources (3 R. 651). The gambling house proprietors would send in checks to the currency exchange. Brown would cash those checks at his bank (initially North Shore National Bank), and irrespective of the balance of the currency exchange at that bank, the bank would honor the checks but charge Brown interest on them until they were collected (3 R. 649-654).*

Then the Government produces what it concludes is a most forceful circumstance, to show Brown's complicity in the scheme to aid Johnson: It discloses that he went to his landlord, Goldstein, to ask aid in making a new bank connection. Nowhere in history has the owner of a legitimate business asked his landlord for help. Nowhere in the field of industry has a man gone to his landlord to suggest that he will have to go out of business and thus discontinue being a tenant unless that landlord can assist him in some way; at least, that is the Government's inference. But this particular landlord testified that he acted for Johnson in purchasing the building in which the currency exchange was located. This, the Government argues, is proof, is evidence, that Brown was a fellow to aiding and abetting Johnson. It is a suspicious link in the circumstance, says the Government. The Government's argu-

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* The North Shore National Bank required Brown to take the currency exchange account from the bank because, as the Government states in its brief at page 78, "too many of the checks deposited were returned for insufficient funds" (3 R. 642-643). It is unquestioned that the gambling house proprietors who deposited the N.S.F. checks had to make good these "too many checks", but the Government neither totalized nor deducted the insufficient funds checks from the supposititious "income" of the currency exchange transactions.

ment is that Johnson bought the building for the purpose of setting up a currency exchange for his alleged gambling houses. The brief of the Government is silent on the fact that Brown did not start his operations until a year after the building had been purchased by Goldstein (3 R. 617).

But the Government has still a further damning bit of evidence against Brown. They produced the witness, Bagshaw, who testified that after Brown closed the exchange on September 30th, Brown said he "had lost the Johnson account" (2 R. 542). Let us join in the Government's assumption that the Johnson referred to was the defendant here. Let us assume that Bagshaw was telling the truth in that part of his testimony, and was not telling the truth two minutes later (2 R. 537) when he testified: "I questioned him 'why close up'? That's the way our conversation went, along that line. Brown didn't exactly say anything when I pointed that out to him. He was just determined to close up, that was all there was to it". Let us waive aside this implied denial that the name "Johnson" was ever mentioned by Brown to Bagshaw. Instead let us assume that Brown thought that this Johnson, Bill or Jack, male or female, had a great influence in the matter of the gamblers' checks being cashed at Brown's currency exchange. Let us even go further and assume that Brown thought that Johnson dominated or controlled the business of cashing gamblers' checks at Brown's currency exchange. In what possible or conceivable way does that fasten the crime here charged against Brown or tend to prove it, or, more pertinently how is it supporting evidence to go to the jury to sustain the conviction of Stuart Solomon Brown?

There is not an iota of anything which resembles evidence in the record that Brown knew or could have known

that Johnson had any interest whatsoever in the gambling houses; but assume he did think Johnson had such an interest, how can he be held to have aided or abetted Johnson or have colluded with the other co-respondents to conceal the taxable income of Johnson? It may as well be assumed from the record that Brown's depositories, the banks, were part and parcel of the conspiracy to aid Johnson in the evading of his income tax return, or at least to assist Sommers, Hartigan and Kelly in falsifying their returns.

On page 79 of its brief, the Government refers to Brown's Grand Jury testimony in this language: "Brown admitted that Hartigan had told him there would be no more checks". Why "admitted"? If the gambling house owners who contributed toward 60% of the currency exchange business were closing, of course there would be no more checks from that source, and who would be more likely so to advise Brown than Hartigan, his partner in the currency exchange?

Perhaps that's it. Perhaps the fact that Hartigan, whom the Government charges helped Johnson conceal income, was a partner of Brown in the currency exchange must perforce make Brown vulnerable to conviction under the instant indictments. The stating of the proposition refutes it.

But there is another grave charge against Brown: After his currency exchange closed, he destroyed the books and records which he no longer needed (3 Rec. 628, 640, 642, 648, 649, 657 and 673). It also was developed that Brown is charged with eluding a Revenue Agent for several days before appearing before the Federal authorities in answer to a summons.

We have detailed all of the evidence which the Government concludes is its case against Brown. This evidence

was expanded* from the middle of page 75 to the bottom of page 80 in the Government's brief, and interwoven *there was a mass of immaterial items in order to make* "the case against Brown", and is characterized by the Government at the bottom of page 80 of its brief thus: "As above shown, the evidence against him was strong * * *. His entire method of operation and the elusive dealings with the Revenue Agent showed he was wilfully aiding and concealing the amount of the income of the gambling houses and Johnson's interest thereon".

We will not say that it is unconscionable to make such a statement or an argument in this Court, but we do spe-

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* Among the details recited as to respondent, Brown, and the only purpose of which must have been to take up space in the brief in order to make a number of paragraphs, are the following:

1. The Lawrence Avenue Exchange was located a short distance from the Albany Park Exchange, and when Brown informed the owner of the latter that he was going to open the Lawrence Avenue Exchange, the owner of the Albany Park Exchange protested.

2. A detailing of the relationship of Bernice Downey, whom Hartigan put in to protect his investment.

3. Half of a page on Hartigan's introduction of Sommers, Kelly and Creighton, and a recital that Hartigan obtained the business of their houses for the currency exchange.

4. Half of a page relating to the closing up of the business in September, 1939, despite the fact that Brown "had a large amount of other business". It is interesting here to note that the Government has already shown "that the other business" was but 40% of the total business of the currency exchange. A loss of 60% of one's business is not an absurd reason for going out of that business, we take it.

5. A page detailing the conflict of testimony involving the burning of the record, which, parenthetically, Brown stated he didn't need (3 R. 637); he kept those necessary for the liquidation of the business.

cifically urge (and the liberty of one of the co-respondents depends upon it) the reading of the Government's argument as to its case against Brown (Government's brief, pp. 75-80).

5. There was no substantial evidence as to either the gross or net income of the gambling houses.

A vital link in the Government's case is predicated upon the exchange of currency and the cashing of checks at various currency exchanges and banks. Contrary to the statement in the Government's brief, currency exchanges do not accept deposits and no deposits were made by these operators. These transactions of the gambling house operators consisted merely of the exchange of old currency for new and the cashing of checks.

Before demonstrating that such currency exchange transactions do not establish gross, let alone net, income to the gambling house operators, it is to be emphasized that *there is no proof in the record of the amount actually involved in these transactions.* No record was kept of currency exchanged by the currency exchanges and banks (3 R. 605). No record was kept of the amount of new currency exchanged for old at the Albany Park Currency Exchange. The alleged amount of currency exchanged at that exhange was determined solely from deposit slips issued by the bank to the exchange when the latter made exchanges of old currency for new, in banks (2 R. 485-487, 492). The owner of the exchange stated that from time to time he had an over-plus of currency, *i. e.*, he had more currency than he needed for the purpose of running his exchange. This cash would be sent back to the bank by the currency exchange and appeared on the same slip and was included in one amount with the currency exchanged by the houses (2 R. 491-492). The currency exchanged by the gambling houses was not shown separately on the slips, and the

owner of the exchange admitted that he could not tell whether the currency shown on the slips represented currency exchanged for the gambling houses or the redeposit of excess currency by the exchange itself (2 R. 492, 498).

While it is stated on page 54 of the Government's brief that in the Government's computation of income, amounts were eliminated as to the currency exchanged, to allow for such redeposits of excess currency by the exchange itself, it is difficult to conceive (and the Government has failed to demonstrate) how any such "allowance" approaching any degree of reasonable accuracy or approximation, could be made. It, like the entire "revolving fund equals income theory" of the currency exchange transactions, is sheer speculation.

Again, in the case of the Northern Trust Company, there is no proof as to the amount of currency exchanged. A special paying teller testified that he exchanged currency for Sommers approximately eighteen times a year during 1936, 1937, 1938 and the first half of 1939. No records were kept (2 R. 507, 3 R. 605) but it was *estimated* that the currency aggregated about $90,000 a year (3 R. 605). On cross examination the teller stated that he did not know whether the same $5,000 bankroll was handled eighteen times a year or whether there were eighteen $5,000 bankrolls involved each year (3 R. 605).

Likewise, the manager of the Lawndale Currency Exchange had no idea as to how much the currency exchange transactions totaled (3 R. 552-559). The Government arrived at an amount by the total amount of $100 bills handled by the exchange during 1936, 1937 and 1938.

In an attempt to show the amount of checks cashed at the Lawrence Avenue Currency Exchange, the Government relies upon the purported statement of Brown to Bagshaw, an accountant for the exchange, that the funds recorded in an account entitled "Reserve for Uncollected

Funds" were from one source and that source was "Mr. Johnson." The accountant stated that no given name was mentioned and that he did not know what Johnson Brown was referring to (2 R. 542-543), or whether the Johnson was male, female or a corporation. Even the Government concedes that at most this statement is an admission chargeable only against Brown, and not against Johnson or the other co-defendants.

It is argued that in the reserve account mentioned above there were recorded only checks forwarded for collection and not paid immediately. The gambling house checks are *assumed* to have been forwarded for collection. It is then concluded that the alleged amount of checks recorded in that account represent gambling house checks and only gambling house checks. Yet there is no testimony to show that the only checks so recorded in the said account were the gambling house checks. Further, the Government concedes that there were included in the alleged amount of gambling checks cashed at the Lawrence Avenue Currency Exchange, checks cashed by Creighton. The Government seeks to explain away the presence of the checks so cashed by Creighton by stating that the amount of checks so cashed by him was not great because Creighton stated that he cashed "some checks" or "a few checks" at that exchange (Brief, pp. 60-61). However, Creighton did state that "after Hartigan asked me to take some business there (Lawrence Ave. Currency Exchange) I took quite a few checks up and * * * either Fred Gitzen or I did take the checks up to Lawrence Avenue whenever we had checks to cash" (3 R. 868-869).

An analysis of the evidence thus shows that there is no proof in this record of the amounts actually involved in the currency exchange transactions. The amounts alleged by the Government are a result of assumptions, inferences and conjectures. However, even if the amounts of the

currency exchange transactions alleged by the Government be taken as true, it is manifest that the guesswork testimony as to such amounts of currency exchanged and checks cashed, did not constitute substantial evidence sufficient for submission to the jury, as to the question of gross income, let alone net income, of the gambling houses.

(a) Exchange of Currency

The Government attributes more than $648,000, as alleged income, to the gambling houses predicated on and only on the purported amounts of currency exchanged by the houses at banks and currency exchanges (Brief, pp. 52-53).

Even a cursory examination of the Government's brief, let alone the record, reveals the weakness of its contention here. The Government concedes that the money of denominations less than $100.00 received in exchange for currency, represented working money used on the gambling tables, and was an exchange of old money for new money, and did not represent winnings, gains or income to the houses (Brief, p. 63, 2 R. 491, 508, 3 R. 604-605). Further, the Government's brief at page 55 states that only "a portion of the currency exchanged at the Northern Trust Company was exchanged for $100 bills, the remainder being in smaller denominations." The record discloses that at most only 14% of the total currency exchanged at the Northern Trust Company was exchanged for $100 bills (3R. 604-605). Yet the Government in its so-called summary of the income of the houses (Brief, pp. 52-53) attributes *all* of the purported total of $340,000 in currency exchanged at the Northern Trust Company as income to the gambling houses, although 86% of that was in the lesser denominations, and even under the Government's contentions constituted only working money and not income!

Likewise, at page 54 of its brief, the Government notes that at most, only one-half of the currency exchanged at the Albany Park Currency Exchange was taken in hundred dollar bills. The remainder was taken in lesser denominations. Yet the Government attributes the total amount of currency purportedly exchanged at this currency exchange (some $234,800) as income to the gambling houses (Brief, pp. 52-53). It is upon such treatment of the alleged facts that the Government predicates its case.

After conceding that the money in denominations of less than $100 received in exchange for currency did not represent gains or income (being exchange of old money for new), the Government urges that the $100 bills so received in exchange for currency were taken out of the business as income and do not represent an exchange or turn-over of money. The only argument which the Government is able to pose in support of this conclusion is to assert that the working money used on the gambling tables were only of lesser denominations. But even the testimony of the Government's witnesses disclose that $100 bills were used as working money (2R. 218), also defense witnesses (3R. 803, 3R. 859, 3R. 816, 3R. 792, 3R. 795, 3R. 939). So that try fails.

Moreover, the $100 bills were used almost exclusively at the houses in the payment of winnings over that amount. That fact stands unchallenged in the record (3R. 792-793, 795, 879, 939). Further, the record discloses the unchallenged and undenied fact that whenever a customer ended his play (be he winner or loser) and had money in small denominations he was asked to turn in the smaller denominations for $100 bills because the small denominations were needed as working money. The record discloses that a principal source for the smaller denominations for the houses were the customers who were given $100 bills in exchange for such smaller denominations

(3R. 792, 795, 879). The record makes it manifest that the $100 bills were not taken out from the business, but on the contrary, were used in the business and were essential to the operation of the business.

The frailty of the Government's position on this so-called *proof* of income is made manifest by its attempt to answer these uncontroverted facts by asserting in apparent seriousness that the amount of $100 bills makes the facts "implausible" and that the jury "in all events" had the advantage of judging the veracity of the witnesses' statements from their demeanor on the witness stand (Government's brief, page 64).

(b) Cashing of Checks

The Government argues that the receipt of a check from a customer by a gambling house is "substantial evidence of the house's receipt of income" (Brief, pp. 61-62). This conclusion upon which so much of the case of the Government rests, is predicated upon a series of premises and unwarranted inferences which do not find support in the record or in reason.

At page 61 of its brief the Government cites the testimony of Kauders (2R. 405), in support of its assertion that customers cashed checks in gambling houses only to pay losses. All that this witness for the Government said was that on occasion *he* cashed checks at the gambling houses and that the checks he so cashed amounted up to several hundred dollars. *There is not one syllable in his entire testimony, upon which the Government relies, which even suggests that he cashed his checks to pay losses or that he gave such checks after his cash was gone!*

The Government relies on the testimony of Kelly (3 R. 879). An examination of the record discloses that Kelly stated, not that the amount of checks cashed represented

the amount of customer's losses, but on the contrary, checks were cashed to accommodate patrons and to furnish them funds with which to gamble (3 R. 879). Some of the cash so obtained might be lost by the customer (3 R. 879), but likewise, that cash used in play might result in winnings. At page 61 of its brief, the Government seeks to rely upon the testimony of Sommers in support of its assertion that the amount of checks cashed represents the amount of customer's losses and therefore the amount of income of the gambling houses. Not only does the testimony of Sommers fail to support this contention of the Government, but on the contrary, *disproves it. Sommers testified that when checks were cashed, the proceeds did not represent profits or gains to the gambling house.* It had no relation to such profits. Checks were cashed as an accommodation to customers (3 R. 816).

Hartigan, in his statement to Internal Revenue Agents which was introduced by the Government, made clear just what the cashing of checks by the gambling houses represented. Checks were cashed to furnish customers with money for play. Further, some checks were cashed for customers after play to provide them with money for personal use after leaving the gambling house (2 R. 463-464). The amount of checks cashed therefore does not represent losses of customers or income to the houses (2 R. 468). The Government itself proved this.

The fact that a patron obtained cash with which to play, for his check, clearly does not lend any support to the Government's conclusion that the amount of cash so obtained was lost and therefore represented income to the gambling houses. Furthermore, should a patron of a gambling house cash a check, win money, and then redeem or pick up his check, he would be under the cloud of not having had sufficient funds to support that check. Hence

no matter how many checks might be cashed to commence play, and no matter how great the cash winnings of the players who gave those checks, the players would leave with currency, not their checks.

Further, it is to be observed that the Government introduced into evidence detailed records of the Albany Park Currency Exchange showing that during the period from June, 1936 to July, 1938 more than $1,200,000 in checks were cashed by the gambling houses. These detailed records disclosed not only the bank upon which each of the checks so cashed were drawn, but also the maker of each check (2 R. 480-483). The Government also introduced the testimony of Agent Lawrason who summarized a great number of checks aggregating about a half a million dollars allegedly cashed by the co-defendant, Creighton, at the Mid-City National Bank. This summarization was made by Agent Lawrason from his examination through a magnifying projector of recordak films which he said showed these checks (2 R. 519-521, 3 R. 715-721). Agent Lawrason spent about five weeks examining those recordak films (3 R. 716). *He stated that memoranda were made of the names of the makers of the checks in question* (3 R. 721). The Government, therefore, had before it the names of a vast number of patrons. It is significant that to support this important assertion of the Government, upon which so much of its case rests (in a case in which the Government called over 145 witnesses) *only two* of the patrons called by the Government gave even meager support to the contention that the checks cashed represented losses and then only as to themselves.

These two (Blake and Bissell) are said to have stated that the checks which *they* cashed represented losses. This is the only testimony in the entire record which lends any support to the Government's contention. (But as we will

demonstrate in a moment, even these two witnesses did *not* say that.) It is reasonable to infer that the Government interviewed many, if not all of the patrons whose names it had obtained. Further, these patrons must have been asked whether the checks which they cashed represented losses or merely represented the furnishing of money or chips with which to play or in part represented the cashing of checks for accommodation to obtain cash for personal use. *Had those patrons stated that the checks which they cashed represented losses*, the Government, in its carefully prepared case, would undoubtedly have introduced their testimony. When it comes to the field of assumption, so glibly indulged in by the Government, we have the right to one little assumption, and we assume that everyone of the thousands of patrons whose names appeared as makers of checks, if and when called in or upon by the Federal investigators, repudiated the "checks mean losses" notion!

But neither of the said patrons (Bissell and Blake) called by the Government, stated that they had observed or knew that their individual experiences with respect to cashing checks constituted a general practice at the gambling houses which they frequented. Bissell testified that he was furnished money with which to play.

But to put a record citation in their brief as to the witness ~~Bissell~~, was indeed a bold step on the part of the Government.

What, in fact, did he say?

"Q. In other words, you don't want the Court and jury to understand that these Exhibits X-1 to X-138 (checks) represent the net loss that accrued to you during your gambling transactions at those places?

A. *No, by no means. In other words, there was winnings and losses.*" (2 R. 220).

The record time and again demonstrates that checks were cashed to furnish money (or chips) for play, and did not represent losses (3R. 463-465; 3R. 816, 879).

Moreover, even Blake testified that the checks he cashed represented not only the amount of *his* loss for the evening, but also represented amounts which he would take with him after leaving the gambling house for personal use (2R. 220).*

Some of the checks cashed by the houses were cashed as an accommodation to neighboring merchants and some were pay roll checks of the employees of neighboring business houses (3R. 879, 816, 842). Nothing in the record in any way negates this testimony. The only attempted refutation by the Government is relegated to a footnote on page 62 of its brief. That attempted refutation takes the form of a query wherein it is asked how many working men and neighboring tradesmen would seek out a gambling house with the alleged searching for fire arms upon entrance in order to cash a check. In answer to this question, it is to be observed that persons who were known (such as neighbors) were not searched for fire arms (2R. 216). Moreover, if any establishment is prey to imposition, or stated reversely, is open to favors for and on behalf of neighbors, a gambling establishment is that one. The corner drug store may coldly turn down the check passer; the grocer may say he hasn't the cash on hand—but the gambling house owner needs the indulgence and good will of all of his neighbors.

The exchange of currency represented nothing but an exchange of the houses' bank roll, not income or gain-

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* Inadvertently (again) the Government neglects to mention that the witness Blake played only at Club Southland, Club Western, and 11[illegible] Vincennes Club—*all owned and operated by Creighton*—who was acquitted. Blake did not even state that he was ever in, about, or near any gambling house of these respondents.

to the houses. This the Government, for all practical purposes ultimately concedes (Government brief, p. 63). Likewise, the cashing of checks by the houses for their customers and others did not represent income to the houses. The record discloses that in cashing checks for the customers and others the gambling houses were acting in precisely the same manner as did the currency exchanges and banks to which they in turn presented these checks. The checks cashed by the houses for their patrons represented, not gains to the houses, but an exchange of the customer's checks for cash which was used for play. In addition to checks cashed for this purpose, the record establishes that a considerable portion of the checks cashed were merely for the accommodation of customers and others (2R. 464, 3R. 816, 3R. 879), and the cash received for such checks was not all used in play but some was taken from the houses by such customers and others. Neither the record, nor any reasonable inference from any fact in the record, supports the Government's position that either the exchange of currency or the cashing of checks at the currency exchanges and banks is evidence of unreported income—the basis for the entire case of the Government against Johnson and the co-defendants.

(c) Income Reported by Respondents, Sommers, Hartigan and Kelly.

The Government's case against these respondents assumes that the gambling houses had a net income in each of the years 1936 through 1939, as disclosed by the charts on pages 52, 53 and 66 of the Government's latest brief, to-wit:

$485,294.28 in 1936
852,890.56 in 1937
850,994.20 in 1938
926,499.30 in 1939

The bald assumption that currency exchanged and checks cashed at currency exchanges represents income predicated upon the wholly unsupported theory that all checks cashed most certainly represented winnings and, therefore, income, has been dissipated herein before (*supra*, pp. 36-46).

There is, however, a conclusive and positive check in the record on the question of income of the gambling houses that gives us with mathematical certainty the answer to the question on income of these co-respondents. No speculation, guesswork or assumption is required. The information which gives us a verification of the income tax returns of Sommers, Hartigan and Kelly is in the record, elicited by the trial court.

The trial Judge developed the only real information in the case (other than the returns of the co-respondent) on the question of income of the gambling houses in question in the years here questioned: He developed through a witness whom he made his own that the house percentage on the game of dice is 2%; and the percentage on roulette games is 5 5 19% (3 R. 846). These percentages may be used to approximate the total gross income of the houses from these games if the total amount bet by patrons on the games is known, or to approximate the total amount bet on the games by patrons if the total gross income from the games to the houses is known. To illustrate, the five (5) houses owned by the respondents Kelly, Hartigan and Sommers had a combined total payroll of $937,000 (1 R. 77-80, 86-89, 94-97), for the year 1939. The combined net income of these respondents from their houses in that year was $37,000 (Government Brief, pp. 71-72). The other expenses of the houses are shown (Government Brief, pp. 88-90) to bring the total of expenses plus the net income to these respondents for the year 1939, over the $1,000,000 mark, which is the gross income of the houses for that year. If this represented 5 5/19% of the total amount bet by patrons they must have bet over $19,000,000 during 1939.

If this represented 2% of the total amount bet by patrons they must have bet over $50,000,000 that year. The actual amount bet probably lies somewhere between these limits.*

The Government has sought to throw a cloud over the income tax returns of these co-respondents by assuming that the currency exchange figure of $926,499.30 in 1939 was income; that the three co-respondents, Sommers, Hartigan and Kelly reported an income of $37,567.00, and then the Government just assumed that the difference between the supposititious income of $926,499.30 and the sum of $37,567 reported by these co-respondents, is the concealed income of Johnson for the year 1939!

"By their very returns, therefore," (says the Government in its brief on page 44), "the respondents portray Johnson in his true stature in their operations," and again, on page 83, the Government argues that these co-respondents would not have conducted "an illegal enterprise * * * for so long a period of time unless it were profitable and indeed unless the net income were commensurate with the risks involved"!** In other words, the Government dis-

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* The Government admits that not all of the $886,499.30, total of checks cashed, in 1939 is properly attributable to Sommers, Hartigan and Kelly (Footnote 19, pp. 60-61, Government Brief). The record shows that not all of the checks cashed by them were cashed by patrons for the purpose of obtaining money with which to play these games.

We have shown above that checks (other than many purely accommodation transactions) were cashed for patrons so that the patrons could have cash with which to play the games. At most therefore, the amount of checks cashed is an index to the amount of money patrons had with which to make bets. That there may have been more than $886,499.30 available for use for the purpose does not require (as the Government in substance and effect asserts) that the total of bets made by patrons exceeded an amount ranging between $19,000,000 and $50,000,000.

** We believe it is common knowledge that at that time, in Cook County, Illinois, the risks involved consisted of a maximum $200 fine.

plays a very large amount of money in the form of currency exchanged, and checks cashed, sets this off against a far smaller amount of money, *i.e.*, the individual income reported by the co-respondents, Sommers, Hartigan and Kelly in their returns for the years in question, and concludes that it is preposterous that these men would let $926,000 go through their fingers and only retain a gross of some $37,000.

We repeat, however, that the only evidence in the record worth consideration (and elicited by the Court) fixes the ratio of gross profits to money handled. That this is not a fantastic or preposterous relationship between money handled and gross income in this case is evidenced by a more sacrosanct form of speculation: In all legitimate brokerage houses in America the standard charge for purchase and sale of securities is ¼ of 1%. A brokerage house, whether on Wall Street in New York or LaSalle Street in Chicago, must handle a million dollars in checks and currency in the purchase and sale of securities before it realizes a gross profit of $2500.

To recapitulate, we have demonstrated that the "evidence" relied upon by the Government to sustain a conviction against Sommers, Hartigan and Kelly must perforce rest entirely upon proof that they respectively and collectively returned false statements of income with the intention of aiding Johnson to conceal his taxable income. The most critical link in the Government's circumstantial and suppositious chain must be that of currency and checks exchanged; it must rest on the theory, to which the Government still clings, that currency exchanged and checks cashed are tantamount to income—net income, or even substantial net income. The argument that the transactions with the currency exchanges

did not represent net income having been refuted, the Government's case against these co-respondents on the substantive and the conspiracy counts is entirely without support. Whatever affinity there may have been between the various owners of gambling establishments, whether in one year two of them used the same trucker, or three others employed the same carpenter, or three more gambling house proprietors used the same bus service, or whether every gambling proprietor of the hundreds in Chicago used the same public utilities, that is not evidence even remotely tending to prove that the co-respondents aided or abetted Johnson in evading his income tax, or that they conspired in an attempt so to do. The use of the same messenger service, statistical bureau, ticker service and blackboard chalk by several stockbrokers, has the same substance upon which to predicate unitary operation and common ownership. The Government's case against these co-respondents then falls with the Government's currency exchange assumptions.

B.

The evidence as to the conspiracy count as to each of the respondents, Sommers, Hartigan, Kelly and Brown.

The conspiracy count charges the respondents with a conspiracy to defraud the United States of income taxes allegedly due from Johnson for the years in question, 1936 to 1939.

This Court has repeatedly held that the gist of an offense of conspiracy is "agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States* v. *Falcone*, 311 U.S. 205, 210, 61 Sup. Ct. 204, 207; *Pettibone* v. *United States*, 148 U.S. 197, 13 Sup. Ct. 542. To support the charge against these respondents as to the conspiracy count, the Government must show by substan-

tial evidence that there was not only an agreement among the alleged conspirators, but that the object and purpose of that agreement was as charged, namely, to defraud the United States of income taxes allegedly due from Johnson for the years in question.

There is no direct evidence of an agreement, or concert of action among the alleged conspirators for the purpose and object of evading Johnson's income tax, and the Government does not contend that there is such direct evidence.

In its treatment of the conspiracy count on pages 81 and 82 of its brief, the Government concedes that the only evidence upon which it relies to establish concert of action and that the purpose of that concert of action was to defraud the United States of income taxes purportedly due from Johnson, is precisely the same disconnected and irrelevant mass of circumstantial evidence upon which it seeks to sustain the charges on the substantive counts. While there may be a conspiracy to defraud the United States of income taxes due from an individual without proof of the actual commission or attempt to commit the crime by evading such taxes, that is not the case here. In this case the Government seeks to rely upon, and only upon, the evidence with respect to the alleged evasion of income taxes by Johnson for the years in question, to prove not only the agreement between the alleged conspirators, but that the object of that purported agreement was to defraud the United States of Johnson's income taxes. With the failure to prove that Johnson owned the gambling houses operated by the defendants, that he received the income from them, that the income so received was greater than that reported by Johnson in his returns, the Government failed to prove the alleged conspiracy to defraud the United States of income taxes allegedly due from Johnson. With the failure to furnish substantial evidence to support

the substantive counts, there was a failure to support the conspiracy count.

Since the evidence relied upon by the Government to support the conspiracy count against each of these respondents is precisely the same as that relied upon to support the substantive counts, the comments in other portions of this brief as to the frailty and insufficiency of that evidence need not be repeated here. Suffice it to say that the Government is relying as to the conspiracy count, upon a number of isolated, disconnected and irrelevant transactions and acts not even tending to prove any agreement among the alleged conspirators for the purpose of defrauding the United States of income taxes allegedly due from Johnson for the years in question.

II.

IN THE CIRCUMSTANCES OF THIS CAUSE PROOF OF THE PURPORTED AMOUNTS OF CHECKS CASHED AND CURRENCY EXCHANGED (WHICH WAS THE ONLY EVIDENCE OFFERED AS TO GROSS RECEIPTS) WAS NOT SUFFICIENT TO ESTABLISH THAT EITHER NET INCOME OR GROSS INCOME RESULTED FROM THE OPERATIONS OF ANY ENTERPRISE IN WHICH JOHNSON IS ALLEGED TO HAVE BEEN INTERESTED.

It has heretofore been demonstrated that the alleged amounts of checks cashed and currency exchanged at the various currency exchanges and banks does not establish gross income or gross receipts to any one or to all of the gambling houses (*supra* pp. 36-46). There was not, therefore, any substantial evidence which warranted the submission by the trial Court to the jury of the charges made against each of the co-respondents on either the substantive counts or the conspiracy count. Certainly, if the violent assumption be made that the spot-checked amounts of

checks cashed and currency so exchanged does constitute evidence of gross *receipts*, it is clear that in the circumstances of this cause, proof of such gross receipts did not establish the amount of *net* income from the operations of any one or from all of the gambling houses.

The Government has urged in support of its contention that had there not been profits the enterprises would not have remained in operation for the period which they did because of the risk involved. In answer to that general and vague argument one need only call attention to the well-known daily phenomena of our economic order in which enterprises continue in operation for several years without a net profit, and where the risk involved is greater than here. Risk? Certainly the Government cannot mean financial risk, for there was, as we have elsewhere demonstrated, a percentage in favor of the house, and thus the size of income depended upon the gross of money handled. True, the overhead was large, and the net returns were not staggeringly large—but men who started with a $5,000 bankroll could double it in a year. But risk? It was the customers' money which paid the way. No fortunes were invested, by any of the gamblers, to initiate a gambling house. The record shows that the bankroll was $5,000. Hundreds of thousands of dollars of *other* peoples money might have been wagered, but that was no "risk" to the proprietor. If the Government implies risk of running afoul of the local and State gambling laws, we point to the small fines—a maximum of $200 if tried and convicted for gambling. The Cook County public was most tolerant of gambling and there were no convictions we know of, during the years in question. If that is *dehors* the record, so is the Government's "risk" improvisation.

Recognizing the frailty of such an approach in seeking to sustain criminal convictions, the Government seeks to

rely upon the fact that to some extent $100 bills were received in exchange for checks and currency along with currency of smaller denominations. The Government argues that this fact has special significance and establishes that the amounts of currency received in cashing checks and in exchange for other currency constitutes net income.

First, it is to be observed that while the Government in its brief at page 83 states that the "major part" of the currency received on the cashing of checks and the exchange of other currency was the form of one hundred dollar bills, the Government's brief at pages 54 and 55 establishes that only a small portion of the currency received in exchange for other currency was in one hundred dollar bills. For example, of the currency exchanged at the Northern Trust Company, which is alleged to constitute over $300,000 for the period in question, only 14% at most, was in one hundred dollar bills (3 R. 604-605).

After this misstatement of fact, the brief of the Government at page 84 then seeks to prove a conclusion from a premise by assuming the conclusion in the premise. The cashing of checks and the exchange of currency in part for one hundred dollar bills is asserted to be the respondent's method of segregating *net* profits. This segregation is then *asserted* to be the equivalent of bank deposits and *ergo* as bank deposits such cashing of checks and exchange of currency are said to be sufficient evidence to raise a jury question as to *net* profits.

Not only is the presence of *some* one hundred dollar bills urged to prove that *all* of the currency received in exchange for other currency and for checks constitutes gross income, but likewise net income. The facts as established by the record are apparently again inadvertently overlooked here, in the Government's argument as to net

profits, just as they were overlooked in the Government's argument as to gross receipts.

The fact is that the one hundred dollar bills were used almost exclusively to pay winnings over that amount (3 R. 792-793, 795, 879, 939). The fact is that whenever a customer ended his play, loser or winner, he would be asked to turn in the small denominations which he might have in exchange for one hundred dollar bills. A principal source for the small denominations used for play on tables (and according to the Government's brief (Page 86), for the payment of employee's wages) were the customers who were given one hundred dollar bills in exchange for smaller denominations (3 R. 792, 795, 879). The fact is that with the relatively small percentage in favor of the house (*supra*, page 47) the total amount of currency handled would be great and the amount of winnings paid off in hundred dollar bills would be great. The fact is that such expenses as rent, horse racing service and the numerous other expenses, each individual item of which clearly exceeded one hundred dollars, were not likely to be paid in one dollar and five dollar bills but were more likely to be paid in one hundred dollar bills. These facts demonstrate that the receipt of one hundred dollar bills, along with money in smaller denominations, upon the exchange of other currency and the cashing of checks, does not constitute proof that the amount of currency exchanged and checks cashed was the amount of either gross or net income from the operation of any or all of the gambling houses.

At page 85 of its brief, the Government argues that since the currency exchange transactions took place during the day and the gambling and horse race betting took place in the afternoon, evening and early morning hours, and since the losses of the gambling houses were paid to its

customers upon the conclusion of a particular bet in a money game, or upon the conclusion of the customer's play in a check (chip) game, it follows that the amounts of currency exchanged and checks cashed represented *net* profits to the gambling houses.

Again, this argument fails to take into account the facts established by the record. The Government's brief has recognized that most of the currency exchange represented working money. Even under the Government's interpretation of the facts, the greatest part of the currency exchanged represented neither gross nor net income but merely a turn-over of working money. Further, the fact is that the checks were cashed to furnish customers with money for play and to accommodate customers and others. The fact that the currency exchange transactions took place when they did supports the contention that by these transactions the gambling houses were *not* segregating net income, but on the contrary were replenishing their currency which was indispensable to the operation of the gambling business. After a day's business the currency resources of the gambling houses were depleted by the cashing of checks to provide money for play and to accommodate customers (and others) with money for personal use. It is to replace this currency that the checks were in turn cashed by the gambling houses. Likewise, it was necessary to convert by the exchange of currency the old worn out money used in play for new money.

The Government's brief, at pages 85 and 86, contends that the limitation on the size of individual bets and the odds in favor of the house made it "highly improbable" that a gambling house's losses for any particular day would be in excess of its winnings. The Government then seeks to make this assumption support its conclusion that the amounts of currency exchanged and checks cashed represented net income. The known percentages in favor of

the gambling houses at *most* were 5-5/19ths% (*supra*, page 47). Nothing in the laws of probability make it "highly probable" that the winnings of a house on any particular day would exceed its losses. Nor is there anything in the laws of probability which makes it "highly probable" that the houses were always winners on the days preceding currency exchange transactions, as the Government assumes in making its contention that the currency exchange transactions for each and every day represented net profits during the period in question.

One of the principal sources for currency of smaller denominations was the customers who, be they winners or losers, were asked to turn in their smaller currency in exchange for the larger denominations (3 R. 792, 795, 879). Moreover, by far the greater portion of the currency received in exchange for other currency was in smaller denominations which obviously could be used in the payment of employees' wages as well as for play.

The Government concedes that with respect to all expenses in the operation of the gambling houses, other than wages and losses to customers, there is no proof that their payment preceded the alleged segregation of gambling receipts through the currency exchange transactions. The alleged amounts of these numerous items of expense, which the Government concedes were substantial, are in many instances arrived at by conjecture. For example, telephone charges, utility bills for gas, light and the like, and moving storage expenses, are summarily dismissed from consideration by the statement in a footnote on page 90 of the Government's brief to the effect that the jury could reasonably conclude that such expenses were within "normal limits." Predicated upon such conjecture, the Government seeks to sustain its contention that all of the amounts of currency exchanged and checks cashed constitute the *net* income of the gambling houses.

To recapitulate, the Government's answer to the Court's second question when stripped of verbiage takes this form:

1. It *assumes* that the income tax returns of the co-respondents failed to reflect the gross amount of currency exchanged and checks cashed by the currency exchanges, and

2. That the currency exchange transactions reflect with substantial accuracy the income of the gambling houses of the co-respondents Sommers, Hartigan and Kelly, and

3. That the co-respondents could not have been satisfied with their reported incomes because of some suppositious risk, and

4. That $100 bills exchanged are tantamount (if and when segregated and hidden in secret and also suppositious vaults) to deposits, and

5 That the exchange for *some* $100 bills proves that *most* of the currency exchanged and checks cashed took the form of $100 bills (easy to hide, guesses the Government; $500 bills would be easier), and

6. That since currency exchange transactions took place in the daytime and play took place both in the daytime and evening, the currency exchange transactions represented *net* profits—to the gambling houses, and

7. That it was "highly improbable" that the gambling houses' losses would exceed winnings in any day and, finally,

8. That having met the payroll, the currency exchanged and checks cashed just must have been net profit and net income.

We believe that we (and the record) have answered this ingenious supplantation of argument for evidence.

CONCLUSION.

The co-respondents are not required to answer Questions 3 and 4, either as directed by the Court or as set forth in the Government's brief. These questions deal with the respondent Johnson's expenditures and the Government's theory in that behalf. There is nothing in that expenditure theory which could possibly reflect on any of the cor-respondents, either as to the substantive counts or as to the conspiracy count.

Whatever there may have been which impelled the conviction of these co-respondents in the trial Court, whether it was the dangling before the jury of the large amounts of dollars that passed through these co-respondents' hands, or the permeation of the atmosphere with the illegal business with which they were connected, or merely the masterful work of the prosecutor, nevertheless the cold, careful scrutiny of the Circuit Court of Appeals pierced the jumbled mass of testimony. The majority of that Court declared that it had no hesitancy in holding that the verdict could not be supported on the ownership-income theory of the Government. That Court characterized the Government's attempt to predicate taxable income upon the violent assumption of the currency exchange theory that a revolving fund equals income, plus the assumption of ownership of the gambling houses in Johnson, as "rank speculation."

We respectfully urge that the judgments of the Circuit Court of Appeals, which reversed the judgments of the

District Court, as to these co-respondents, and each of them, be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 4 and 5.—October Term, 1942.

The United States of America, Petitioner,
4 vs.
William R. Johnson.

The United States of America, Petitioner,
5 vs.
Jack Sommers, James A. Hartigan, John M. Flanagan, William P. Kelly and Stuart Solomon Brown.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 7, 1943.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an indictment in five counts. Four charge Johnson with attempts to defraud the income tax for each of the years from 1936 to 1939, inclusive, and charge a dozen others with aiding and abetting Johnson's efforts. The fifth count charges Johnson and the others with conspiracy to defraud the income tax during those years. The substantive counts charge violations of the penal provisions of the Revenue Acts of 1936 and 1938, now embodied in general form in § 145 (b) of the Internal Revenue Code, 53 Stat. 63, 26 U. S. C. § 145(b). The conspiracy count is based on the old § 5440 of the Revised Statutes, which later became § 37 of the Criminal Code, 35 Stat. 1096, 18 U. S. C. § 88.

As to four of the defendants, the cause was dismissed upon motion of the United States Attorney; three others were acquitted by the jury. Of the six remaining defendants, the jury brought in a verdict of guilty on all five counts against Johnson, Sommers, Hartigan, Flanagan, and Kelly, and against Brown on counts three and four, the substantive counts for the years 1938 and 1939, and on the conspiracy count. The district court imposed on Johnson a sentence of five years on each of the first four counts and of two years on the conspiracy count, as well as a fine of $10,000

on each of the five counts. The terms of imprisonment were to run concurrently and the payment of $10,000 would discharge all fines. Lesser concurrent sentences and fines were imposed on the other defendants.

The Circuit Court of Appeals reversed the judgments. Its holding undermined the entire prosecution in that it found the indictment void because it was returned by an illegally constituted grand jury. But it went beyond that major ruling. It found the four substantive counts of the indictment, in so far as they charged defendants as aiders and abettors, fatally defective. Proceeding to the merits, the court held that the case properly went to the jury against Johnson on the last four counts and that the evidence sustained the verdict against all the defendants on the conspiracy count, but that a verdict should have been directed for Johnson on the first count and for the other defendants on all but the conspiracy count. Finally, it found that the testimony of an expert accountant for the government invaded the jury's province and that its admission was prejudicial error. 123 F. 2d 111. Judge Evans dissented on all points. He found no infirmities in the indictment or in the rulings by the trial judge, and thought that the case was properly committed to the jury. *Id.*, 128. On rehearing, the Circuit Court of Appeals adhered to its views, but withdrew an erroneous part of its grounds for deeming admission of the expert accountant's testimony to be prejudicial. 123 F. 2d 142. We brought the case here because it concerns serious aspects of federal criminal justice. 315 U. S. 790.

Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance. Therefore, in deciding that the defendants were held to answer for an infamous crime on what was merely a scrap of paper and not "the indictment of the Grand Jury" as required by the Fifth Amendment, the lower court went beyond that which relates to the special circumstances of a particular case. Unlike most of the other rulings below, the court here dealt with a matter of deep concern to the administration of federal criminal law. At the root of the court's decision is its finding that an order extending the life of the grand jury was void, and that the indictment was therefore returned by a body not lawfully empowered

to act. A brief history of the proceedings which led to the filing of this indictment in open court on March 29, 1940, is therefore essential.

Terms of court of the District Court for the Eastern Division of the Northern District of Illinois are, by statute, fixed for the first Monday in February, March, April, May, June, July, September, October, and November, and on the third Monday in December. 28 U. S. C. § 152. This grand jury was impaneled at the December 1939 term of the district court, and was therefore empowered to sit through January 1940. By an order, the validity of which is undisputed, its life was continued into the February term. And on February 28, 1940, the district court authorized a further continuance of this grand jury during the March 1940 term. This is the order which gives rise to the controversy, for upon its legality depends the validity of the indictment thereafter returned by the grand jury. The disputed order reads as follows:

"Now comes the Second December Term 1939 Grand Jury for the Northern District of Illinois, Eastern Division, by Dorothy W. Binder, Forewoman, and in open Court requests that an order be entered authorizing them, the said Second December, 1939 Grand Jury, heretofore authorized to sit during the February 1940 Term of this Court, to continue to sit during the Term of Court succeeding the said February Term of Court, to-wit, the March 1940 Term of Court, to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 Terms of this Court, and which said investigations cannot be finished during the said February 1940 Term of Court; and the Court being fully advised in the premises,

"It Is Therefore Ordered That the Second December 1939 Grand Jury, now sitting in this Division and District, be, and it is hereby authorized to continue to sit during the March 1940 Term of Court for the purpose of finishing said investigations."

The Court below construed this order as authorizing the grand jury to sit during March to enable it to finish investigations begun in February, while under the governing statute, § 284 of the Judicial Code, 28 U. S. C. § 421, it could be authorized only "to finish investigations begun but not finished by such grand jury" during its original term, *i. e.*, the December 1939 term. So to read the order, however, is to dissociate language from its appropriate function and to disregard the historic rôle of the grand jury in our federal judicial system. Since the law permits a continuance of the grand jury "to finish investigations" begun

during its original term, the most elementary requirement of attributing legality to judicial action should, unless violence is done to English speech, lead to a reading of the order of February 28 so as to restrict the grand jury to that which it legally could do instead of to an expansive reading making for illegality.

The foundation for the holding that the order extending the grand jury into the March term purported to give authority in defiance of the statute is the phrase in the order reciting the grand jury's request that it be authorized to continue its sitting during the March term "to finish investigations begun but not finished by said grand jury during the said December 1939 and the said February 1940 Terms of this Court, and which said investigations cannot be finished during the said February 1940 Term of Court." The Circuit Court of Appeals read this to mean that the grand jury requested a continuance into the March term to finish investigations begun in the February as well as in the original December term. But surely the recital "to finish investigations begun but not finished by said grand jury during the said December 1939 and the said February 1940 Terms", is, at the worst, dubious as to what was begun and what was finished. Judge Evans rightly resolved the ambiguity by reading the disputed language "during the said December 1939 and the said February 1940 Terms" as qualifying "finished" rather than "begun", and therefore meaning that the grand jury was unable to finish during the December and February terms that which it had begun when it first came into being in the December term. Such a rendering makes good English as well as good sense. To read it as the court below read it is to go out of one's way in finding that the judge who granted the order of extension either wilfully or irresponsibly did a legally forbidden act, namely, to allow a grand jury to sit beyond the term and take up new instead of finishing old business. For the legal limitations governing extension of the life of a grand jury do not lie in a recondite field of law in which a federal district judge may easily slip. Certainly every district judge in a great metropolitan center like Chicago knows that in authorizing a grand jury to continue to sit "for the purpose of finishing" their "investigations", the "investigations" must have been begun during the grand jury's original term and that new domains of inquiry may not thereafter be entered by the grand jury.

The failure of the court below to recognize the essential function of the grand jury in our system of criminal justice is revealed by its subsidiary argument in regard to the fourth count. Since that charges an attempted evasion of Johnson's taxes for the year 1939, and since such an attempt could not have become manifest prior to the filing of his return on March 15, 1940, the court reasoned that the "investigation" into this charge necessarily could not have been begun prior to the March term and that it therefore constituted a "new" investigation. Such a view misconceives the duties and workings of a grand jury. It is invested with broad investigatorial powers into what may be found to be offenses against federal criminal law. Its work is not circumscribed by the technical requirements governing the ascertainment of guilt once it has made the charges that culminate its inquiries. A grand jury that begins the investigation of what may be found to be obstructions to justice or passport frauds or tax evasions opens up all the ramifications of the particular field of inquiry. Its investigation in such cases may be into a course of conduct continuing during, and perhaps even after, its inquiry. And Congress certainly did not restrict a grand jury in dealing with all crimes disclosed by its investigation. The very purpose of the Act of February 25, 1931, 46 Stat. 1417, 28 U. S. C. § 421, allowing grand juries to continue investigations beyond the arbitrary periods that constitute terms of court in the various federal districts, was to make the grand jury a more continuous and therefore more competent instrument of what have become increasingly more complicated inquiries into violations of the enlarged domain of federal criminal law. That Congress did not have a restrictive view of the "investigations" which a grand jury was authorized to pursue to completion beyond its original term is emphasized by the Act of April 17, 1940, 54 Stat. 110, amending the Act of 1931, *supra*. Under the original Act a grand jury was not permitted to sit "during more than three terms". But since the terms of court are of varying duration, a fact to which the attention of Congress was directed by the experience particularly in the Southern District of New York, Congress extended the potential life of a grand jury from "three terms", which in some districts might be only three months, to "eighteen months". The considerations which induced Congress to enlarge still further the already ample scope of grand jury investigations and the manner in which the House committee report

spoke of a grand jury's work, see H. Rep. No. 1747, 76th Cong., 3d Sess., are but confirmation that that for which a grand jury may continue its sitting is the general subject-matter on which it originally began its labors. It is not forbidden to inquire into new matters within the general scope of its inquiry but only into a truly new, in the sense of dissociated, subject-matter.

One can hardly conceive of a clearer case of a continuing investigation of an old subject-matter than that presented here. The grand jury in December 1939 began investigation into alleged tax evasions by Johnson. It was allowed to continue its sitting during the February term, and its authority was further extended to permit it to sit during March. The grand jury found a systematic practice of tax evasion over a course of years, and yet, so we are urged, it could not continue to ferret out one more phase of this continuous course of fraudulent conduct because that did not ripen into a separate offense until the last term of the grand jury's sitting. So to hold is to make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing. See *Hale* v. *Henkel*, 201 U. S. 43, 65; *Blair* v. *United States*, 250 U. S. 273, 282; *Cobbledick* v. *United States*, 309 U. S. 323, 327.

By way of reinsurance of its main basis for invalidating the indictment, the Circuit Court of Appeals relied on a wholly different line of argument from that which we have just rejected. It held that the preliminary motions, by which the defendants sought to quash the indictment because of the grand jury's illegality, raised issues of fact. It therefore found that the district court, instead of granting the government's motion to strike the pleas in abatement, should have put the government to answer. The indictment itself alleged that the grand jury "having begun but not finished during said December Term . . . an investigation of the matters charged in this indictment, and having continued to sit by order of this Court . . . during the February and March Terms . . . for the purpose of finishing investigations begun but not finished during said December Term . . . ." The court below was apparently of the view that a mere denial of such a solemn allegation by the grand jury puts its truth in issue, that the burden is upon the government "to support it with proof", and that failure to vindicate the authority of the grand jury is "fatal". Assuming that under any circumstances a grand jury's allegation that the indictment which it

returns was the outcome of an investigation "begun" during its original term and was not a forbidden new investigation "begun" during an extended term, within the meaning of § 284 of the Judicial Code, 28 U. S. C. § 421, presented a traversable issue, the circumstances that could raise such an issue would indeed have to be extraordinary and the burden of establishing it would rest heavily on defendants. Compare *Roche* v. *Evaporated Milk Ass'n.*, No. 584, this Term, decided May 3, 1943.

Were the ruling of the court below allowed to stand, the mere challenge, in effect, of the regularity of a grand jury's proceedings would cast upon the government the affirmative duty of proving such regularity. Nothing could be more destructive of the workings of our grand jury system or more hostile to its historic status. That institution, unlike the situation in many states, is part of the federal constitutional system. To allow the intrusion, implied by the lower court's attitude, into the indispensable secrecy of grand jury proceedings—as important for the protection of the innocent as for the pursuit of the guilty—would subvert the functions of federal grand juries by all sorts of devices which some states have seen fit to permit in their local procedure, such as ready resort to inspection of grand jury minutes. The district court was quite within its right in striking the preliminary motions which challenged the legality of the grand jury that returned the indictment. To construe these pleadings as the court below did would be to resuscitate seventeenth century notions of interpreting pleadings and to do so in an aggravated form by applying them to the administration of the criminal law in the twentieth century. Protections of substance which now safeguard the rights of the accused do not require the invention of such new refinements of criminal pleading.

Another ruling of general importance in the law of criminal pleading was made by the Circuit Court of Appeals. It will be recalled that the first four counts charge Johnson with attempts to defraud the revenue, and that the other defendants are in the same counts charged as aiders and abettors of Johnson. The court below ruled that a demurrer of the defendants other than Johnson to those four counts should have been sustained. It found that these counts were, as to the co-defendants, both inconsistent and duplicitous. They were deemed inconsistent in that the offenses against Johnson were charged as of March 15th of each year, whereas the co-defendants "as aiders and abettors are

charged with an offense which extended over a period of years". They were deemed duplicitous in that the co-defendants were in each count charged with conduct that aided and abetted Johnson both before and after March 15th of the revelant year, and were therefore, in the court's view, charged in the same count as accessories both before and after the fact.

We are constrained to say that the court was led into error by a misreading of the statutes which underlie these counts and the allegations which laid the offenses. The basis of each of the four counts, we have noted, is a penal sanction in successive revenue laws, now generalized by the provision in the Internal Revenue Code, 53 Stat 63, 26 U. S. C. § 145(b), which makes it a felony for any person who, being subject to the income tax, "willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof". Section 332 of the Criminal Code (18 U. S. C. § 550) makes every person who "directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces, or procures its commission" a "principal". The vice of the lower court's ruling is its misconception of the nature of the offense defined by § 145(b), with which Johnson is charged, as well as that of the relation of aiders and abettors, made principals by § 332 of the Criminal Code to such an offense. In short, the Circuit Court of Appeals read the substantive counts as though they charged Johnson with the filing of false returns on March 15th. That ~~is made an offense~~ a misdemeanor by § 145(a) of the Internal Revenue Code, but that is not the offense with which Johnson was charged. He was charged with a felony made so by § 145(b), the much more comprehensive violation of attempting "in any manner to defeat and evade" the payment of an income tax. The false return filed on March 15th was only one aspect of what was a process of tax evasion. And all who contributed consciously to furthering that illicit enterprise aided and abetted its commission and thereby, under § 332 of the Criminal Code, became principals in the common enterprise. Therefore, non-participation in merely one phase of Johnson's attempted evasion, namely, the filing of a false return on March 15th, is in itself irrelevant, and it is equally irrelevant that the aid which the co-defendants gave Johnson continued after March 15th as well as preceded it. The crime of each of the first four counts is the wilful attempt to evade the payment of

what was due to the revenue. All who participated in that attempt were contributors to the illicit enterprise. There was only one offense in each count, and all who shared in its execution have equal responsibility before the law, whatever may have been the different rôles of leadership and subordination among themselves. There is neither inconsistency nor duplicity in these four counts and the demurrers to them were properly overruled.

There remain only questions pertinent to this particular case, and more particularly whether the evidence warranted leaving the case to the jury. This was a six weeks' trial of which the record, even in the abbreviated form used on appeal, runs over a thousand printed pages. We have painstakingly examined it all, but it would be unprofitable to give more than the barest outline of what went to the jury. The details sufficiently appear from the two opinions below.

Johnson was a gambler on a magnificent scale. The income which he himself reported from winnings for one of the years in question exceeded a quarter of a million dollars. The lowest annual income so reported for the period is more than $100,000. His other co-defendants were plainly smaller fry in Chicago's gambling world. Their reported annual gambling income during the same period ranged from $3,600 to $19,000. Concededly Johnson frequented some half-dozen gambling houses, ostensibly separately owned by the others found guilty, excepting only Brown who was the nominal owner of a so-called currency exchange which furnished private banking facilities for these gambling houses. Indisputably, also, Johnson had a continuous and close relation to these gambling houses. The decisive issue of fact was whether Johnson's relation to these so-called gambling clubs was that of a patron or of a proprietor. The testimony both for the government and for the defendants focussed on that question. During the course of his extensive testimony, Johnson himself put simply and completely the only real problem before the jury when he swore that he "never had any financial interest in any gambling Club operated by any of the defendants".

The jury decided this central issue against Johnson. And the argument that there was not enough evidence on which a jury was entitled to make such a finding does not call for extended discussion. In making this ultimate finding the jury must have found that the string of gambling houses with which Johnson was associated over a period of years, while ostensibly conducted as separate enterprises by his co-defendants in separate owner-

ship, was in fact a single unified gambling enterprise. A voluminous body of lurid and tedious testimony, often through obviously unwilling witnesses, amply justified the jury in finding that these pretended separate houses were under a single domination. The testimony also amply justified the conclusion that Johnson owned a proprietary interest in this network of gambling houses and was not merely a patron or an occasional accommodating dealer when other patrons desired to play for stakes beyond the conventional limit. Having been justified in finding that the individual defendants were screens behind which Johnson operated, the jury was also justified in finding that there were winnings from these houses on which Johnson attempted to evade income tax payments. Even such records as were kept in these houses were destroyed. But that these gambling transactions were on an enormous scale was overwhelmingly established. It is not to be expected that the actual financial transactions of such a vast illicit business would appear by direct proof. Compare *United States v. Weber*, 79 F. 2d 526. The long duration of this gambling business, the substantial evidence of the operation of the law of probability in favor of the houses, such records as there were pertaining to the private banking facilities and currency exchanges, which were at the service of these houses, made it not a matter of remote speculation but of justifiable proof that there were winnings of a substantial amount which Johnson did not report.

That he had large, unreported income was reinforced by proof which warranted the jury in finding that certainly for the years 1937, 1938, and 1939, the private expenditures of Johnson exceeded his available declared resources. It is on this latter ground —namely, that presumably Johnson's expenditures justified the finding that he had some unreported income which was properly attributable to his earnings from the gambling houses—that the court below thought that the evidence on three of the substantive counts, those for 1937, 1938, and 1939, were sufficient to go to the jury. That is enough to sustain the judgment against Johnson, for the sentences on all the counts were imposed to run concurrently.

Of course the government did not have to prove the exact amounts of unreported income by Johnson. To require more or more meticulous proof than this record discloses that there were unreported profits from an elaborately concealed illegal business, would be tantamount to holding that skilful concealment is an invincible barrier to proof. [illegible] the probative sufficiency of

the testimony has the support of the District Court (on which is included the verdict of the jury) and of the Circuit Court of Appeals. It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents." *Delaney* v. *United States*, 263 U. S. 586, 589-90. And this consideration—the concurrence of both courts below in the sufficiency of the jury's verdict—renders unnecessary further discussion the verdict against all the defendants, including Brown, on the conspiracy count. For while Brown was also convicted on two substantive counts, the conspiracy charge is sufficient to absorb his sentence.

Not many words are needed to dispose of the question of the sufficiency of the evidence to warrant submission to the jury of the substantive counts against the other aiders and abettors, Sommers, Hartigan, Flanagan, and Kelly. In holding that the motion for directed verdicts on the counts charging aiding and abetting should have been granted, the court below was largely misled by its erroneous conception, with which we have already dealt, of the crime of aiding and abetting in the circumstances of this case. In other words, as a matter of evidence as well as a matter of pleading, the court was dominated by the notion that the co-defendants did not aid and abet Johnson if they actually did not share in the making of his false return on each March 15th. The nub of the matter is that they aided and abetted if they consciously were parties to the concealment of his interest in those gambling clubs of which they themselves pretended to be proprietors. Evidence of conduct, acts and admissions, amply warranted the trial court to send the substantive counts against the aiders and abettors to the jury.

A ruling on evidence, much pressed upon us, must finally be noticed. The court below held that the admission of the testimony of an expert witness regarding Johnson's income and expenditures during the disputed period invaded the jury's province. The witness gave computations based on substantially the entire evidence in the record as to Johnson's income. The Circuit Court of Appeals held that while undoubtedly "a proper hypothetical question could have been framed and propounded", in fact the witness was not giving answers on the basis of any assumption or hypothesis but as testimony on the "controverted issue" in the case. 123 F. 2d at 128. We do not so read the meaning of this testimony. No issue was withdrawn from the jury. The correctness or credi-

bility of no materials underlying the expert's answers was even remotely foreclosed by the expert's testimony or withdrawn from proper independent determination by the jury. The judge's charge was so clear and correct that no objection was made, though, of course, there were exceptions to the refusal to make the usual requests for charges that were either redundant or unduly particularized items of testimony. The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendants' assumptions of the case. So long as proper guidance of a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's, we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules.

The decision below must therefore be reversed and the cause remanded to the Circuit Court of Appeals for proper disposition in accordance with this opinion.[1]

Reversed.

Mr. Justice ROBERTS concurs in that portion of the opinion which deals with the validity of the indictment. He is of opinion that the judgment of the Circuit Court of Appeals should be affirmed because, in the case of Johnson, substantial trial errors in the admission of evidence operated to his prejudice, and, in the case of the other defendants, because there was no evidence whatever to prove that they aided or abetted Johnson in any effort to commit a fraud upon the revenue and none to prove that they were parties to a conspiracy with him having the same object.

Mr. Justice MURPHY, Mr. Justice JACKSON and Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

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[1] After the case came here, the Government asked that the petition as to Flanagan, who had died, be dismissed. Accordingly, we dismiss the writ as to Flanagan and leave the disposition of the fine that was imposed on him to the Circuit Court of Appeals. See United States v. Pomeroy, 152 Fed. 279, reversed in 164 Fed. 324.